APPENDIX C (VOLUME IV)

AMENDMENTS TO THE GUIDELINES MANUAL

This volume of Appendix C presents amendments to the guidelines, policy statements, and official commentary effective November 1, 2012 (amendments 761–770); November 1, 2013 (amendments 771–779); November 1, 2014 (amendments 780–789); November 1, 2015 (amendments 790–797); August 1, 2016 (amendment 798); November 1, 2016 (amendments 799–804); November 1, 2018 (amendments 805–813); November 1, 2023 (amendments 814–825); November 1, 2024 (amendments 826–831); and November 1, 2025 (amendments 832–836).

For amendments to the guidelines, policy statements, and official commentary effective November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; and November 1, 2011, *see* Appendix C, Volume III (amendments 663–760). For amendments effective November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; and November 5, 2003, *see* Appendix C, Volume II (amendments 576–662). For amendments effective November 1, 1997, and earlier, *see* Appendix C, Volume I (amendments 1–575).

The format under which the amendments are presented in Appendix C, including this volume, is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language.

AMENDMENTS

AMENDMENT 761

AMENDMENT: The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(E) by adding at the end the following:

"(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.";

in Note 3(F) by adding at the end the following:

"(ix) *Fraudulent Inflation or Deflation in Value of Securities or Commodities*.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security

or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—

(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and

(II) multiplying the difference in average price by the number of shares outstanding.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (*e.g.*, changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).";

in Note 12(A) by adding at the end the following:

"(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a 'bailout'.";

in Note 12(B)(ii) by adding at the end the following:

"(VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a 'bailout'.";

in Note 19(A)(iv) by inserting before the period at the end the following: ", such as a risk of a significant disruption of a national financial market";

and in Note 19(C) by adding after the first paragraph the following new paragraph:

"For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.".

Section 2B1.4(b) is amended by striking "Characteristic" and inserting "Characteristics"; and by adding at the end the following:

"(2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level 14, increase to level 14.".

The Commentary to §2B1.4 captioned "Application Note" is amended in the caption by striking "Note" and inserting "Notes"; by redesignating Note 1 as Note 2 and inserting before Note 2 (as so redesignated) the following:

"1. *Application of Subsection (b)(2).*—For purposes of subsection (b)(2), an 'organized scheme to engage in insider trading' means a scheme to engage in insider trading that

involves considered, calculated, systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

(A) the number of transactions;

(B) the dollar value of the transactions;

(C) the number of securities involved;

(D) the duration of the offense;

(E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);

(F) the efforts undertaken to obtain material, nonpublic information;

(G) the number of instances in which material, nonpublic information was obtained; and

(H) the efforts undertaken to conceal the offense.";

in Note 2 (as so redesignated) by striking "only"; and by adding at the end the following new paragraph:

"Furthermore, §3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant's employment in such a position was used to facilitate significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. *See* §3B1.3, comment. (n. 4).".

The Commentary to §2B1.4 captioned "Background" is amended by adding at the end the following new paragraph:

" Subsection (b)(2) implements the directive to the Commission in section 1079A(a)(1)(A) of Public Law 111–203.".

REASON FOR AMENDMENT: This amendment responds to the two directives to the Commission in the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203 (the "Act"). The first directive relates to securities fraud and similar offenses, and the second directive relates to mortgage fraud and financial institution fraud.

Securities Fraud and Similar Offenses

Section 1079A(a)(1)(A) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of

Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses." Section 1079A(a)(1)(B) provides that in promulgating any such amendment the Commission shall—

(i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—

(I) the serious nature of the offenses described in subparagraph (A);
(II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and
(III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) make any necessary conforming changes to guidelines; and

(v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment responds to this directive in two ways. First, the amendment amends the fraud guideline, §2B1.1 (Theft, Property Destruction, and Fraud), to provide a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. Case law and comments received by the Commission indicate that determinations of loss in cases involving securities fraud and similar offenses are complex and that a variety of different methods are in use, possibly resulting in unwarranted sentencing disparities.

The amendment amends §2B1.1 to provide a special rule regarding how to calculate actual loss in these types of cases. Specifically, the amendment creates a new Application Note 3(F)(ix) which establishes a rebuttable presumption that "the actual loss attributable to the change in value of the security or commodity is the amount determined by (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and (II) multiplying the difference in average price by the number of shares outstanding." The special rule further provides that, "[i]n determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (*e.g.*, changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events)."

The special rule is based upon what is sometimes referred to as the "modified rescissory method" and should ordinarily provide a "reasonable estimate of the loss" as required by Application Note 3(C). This special rule is intended to provide courts a workable and consistent formula for calculating loss that "resulted from the offense." *See* §2B1.1, comment. (n.3(A)(i)).

By averaging the stock price during the period in which the fraud occurred and a set 90-day period after the fraud was discovered, the special rule reduces the impact on the loss calculation of factors other than the fraud, such as overall growth or decline in the price of the stock. *See, e.g.*, *United States v. Bakhit*, 218 F. Supp. 2d 1232 (C.D. Cal. 2002); *United States v. Snyder*, 291 F.3d 1291 (11th Cir. 2002); *United States v. Brown*, 595 F.3d 498 (3d Cir. 2010); *see also* 15 U.S.C. § 78u-4(e) (statutorily setting forth a similar method for loss calculation in the context of private securities litigation). Furthermore, applying this special rule could "eliminate[], or at least reduce[], the complexity, uncertainty, and expense inherent in attempting to determine out-of-pocket losses on a case-by-case basis." *See United States v. Grabske*, 260 F. Supp. 2d. 866, 873–74 (N.D. Cal. 2002).

By applying a rebuttable presumption, however, the amendment also provides sufficient flexibility for a court to consider the extent to which the amount determined under the special rule includes significant changes in value not resulting from the offense (*e.g.*, changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

The amendment also responds to the first directive by amending the insider trading guideline, §2B1.4 (Insider Trading). First, it provides a new specific offense characteristic if the offense involved an "organized scheme to engage in insider trading." In such a case, the new specific offense characteristic provides a minimum offense level of 14. The commentary is also amended to provide factors the court may consider in determining whether the new minimum offense level applies.

The amendment reflects the Commission's view that a defendant who engages in considered, calculated, systematic, or repeated efforts to obtain and trade on inside information (as opposed to fortuitous or opportunistic instances of insider trading) warrants, at minimum, a short but definite period of incarceration. Sentencing data indicate that when a defendant engages in an organized insider trading scheme, the gain from the offense ordinarily triggers an enhancement under §2B1.4(b)(1) of sufficient magnitude to result in a guideline range that requires a period of imprisonment. The amendment, however, ensures that the guidelines require a period of incarceration even in such a case involving relatively little gain.

The amendment also amends the commentary to §2B1.4 to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases. In particular, the new commentary in Application Note 2 provides that §3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. The commentary further provides examples of positions that may qualify for the adjustment, including a hedge fund professional who regularly participates in securities transactions or a lawyer who regularly provides professional assistance in securities transactions. Individuals who occupy such positions possess special knowledge regarding the financial markets and the rules prohibiting insider trading, and generally are viewed as more culpable. *See* §3B1.3, comment. (backg'd.). The commentary also provides as an example of a position that would not qualify for the adjustment in §3B1.4 a clerical worker in an investment firm. Such a position ordinarily does not involve special skill and is not generally viewed as more culpable.

Mortgage Fraud and Financial Institution Fraud

Section 1079A(a)(2)(A) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the

guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions." Section 1079A(a)(2)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

(i) ensure that the guidelines and policy statements reflect—

(I) the serious nature of the offenses described in subparagraph (A);
(II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and
(III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) make any necessary conforming changes to guidelines; and

(v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment responds to this directive in two ways.

First, the amendment adds language to the credits against loss rule, found in Application Note 3(E) of the commentary to §2B1.1. Application Note 3(E)(i) generally provides that the determination of loss under subsection (b)(1) shall be reduced by the money returned and the fair market value of the property returned and services rendered to the victim before the offense was detected. In the context of a case involving collateral pledged or otherwise provided by the defendant, Application Note 3(E)(ii) provides that the loss to the victim shall be reduced by either "the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing."

The Commission received comment that, in cases involving mortgage fraud where the collateral has not been disposed of by the time of sentencing, the fair market value of the collateral may be difficult to determine and may require frequent updating, especially in cases involving multiple properties. The comments further indicate that the lack of a uniform process may result in unwarranted sentencing disparities.

The amendment responds to these concerns by establishing a new Application Note 3(E)(iii) applicable to fraud cases involving a mortgage loan where the underlying collateral has not been disposed of by the time of sentencing. In such a case, new Application Note 3(E)(iii) makes two changes to the calculation of credits against loss. First, the note changes the date on which the fair market value of the collateral is determined, from the time of sentencing to the date on which the guilt of the defendant has been established. This change is intended to avoid the need to reassess the fair market value of such collateral on multiple occasions up to the date of sentencing. Second, it establishes a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the tax assessment is a reasonable estimate of fair market value, the note further provides that the court may consider the recency of the tax assessment and the extent to which

the jurisdiction's tax assessment practices reflect factors not relevant to fair market value, among other factors.

By structuring the special rule in this manner, the amendment addresses the need to provide a uniform practicable method for determining fair market value of undisposed collateral while providing sufficient flexibility for courts to address differences among jurisdictions regarding how closely the most recent tax assessment correlates to fair market value. The Commission heard concerns, for example, that, in some jurisdictions, the most recent tax assessment may be outdated or based upon factors, such as the age or status of the homeowner, that have no correlation to fair market value.

The amendment also responds to the second directive by amending the commentary regarding the application of §2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved specific types of financial harms (*e.g.*, jeopardizing a financial institution or organization). This commentary, contained in Application Note 12 to §2B1.1, provides a non-exhaustive list of factors the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution or an organization that was a publicly traded company or that had more than 1,000 employees was substantially jeopardized. For example, in the context of financial institutions, the court shall consider whether the financial institution became insolvent, was forced to reduce benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment, or investment, or was so depleted of its assets as to be forced to merge with another institution. Similarly, in the context of a covered organization, the court shall consider whether the organization became insolvent or suffered a substantial reduction in the value of its assets, filed for bankruptcy, suffered a substantial reduction in the value of its equity securities or its employee retirement accounts, or substantially reduced its workforce or employee pension benefits.

The amendment amends Application Note 12 to add as a new consideration whether one of the listed harms was likely to result from the offense, but did not result from the offense because of federal government intervention, such as a "bailout." This amendment reflects the Commission's intent that §2B1.1(b)(15)(B) account for the risk of harm from the defendant's conduct and its view that a defendant should not avoid the application of the enhancement because the harm that was otherwise likely to result from the offense conduct did not occur because of fortuitous federal government intervention.

Departure Provisions

Finally, the amendment also responds to the Act's directives by amending the departure provisions in §2B1.1 to provide two examples of cases in which a departure may be warranted.

First, the amendment amends Application Note 19(A)(iv), which provides that an upward departure may be warranted if the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1). The amendment adds "risk of a significant disruption of a national financial market" as an example of such a risk. This part of the amendment responds to the requirement in the Act to consider whether the guidelines applicable to the offenses covered by the directives appropriately "account for the potential and actual harm to the public and the financial markets[.]"

The amendment also amends Application Note 19(C), which provides that a downward departure may be warranted if the offense level substantially overstates the seriousness of the offense, by adding an example of a case in which such a departure may be appropriate. The example provides that "a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims," and that, "in such

a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense." This part of the amendment responds to concerns raised in comment and case law that the cumulative impact of the loss table and the victims table may overstate the seriousness of the offense in certain cases.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 762

AMENDMENT: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(D) in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" by inserting after the entry relating to N-N-Dimethylamphetamine the following new entry:

"1 gm of N-Benzylpiperazine = 100 gm of marihuana".

REASON FOR AMENDMENT: This amendment responds to concerns raised by the Second Circuit Court of Appeals and others regarding the sentencing of offenders convicted of offenses involving BZP (N-Benzylpiperazine), which is a Schedule I stimulant. *See United States v. Figueroa*, 647 F.3d 466 (2d Cir. 2011). The amendment establishes a marijuana equivalency for BZP offenses in the Drug Equivalency Table provided in Application Note 10(D) in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The marijuana equivalency established by the amendment provides that 1 gram of BZP equals 100 grams of marijuana.

Prior to the amendment, the Drug Equivalency Table did not include a marijuana equivalency for BZP. As a result, in offenses involving BZP, the court determined the base offense level using the marijuana equivalency of "the most closely related controlled substance" referenced in §2D1.1. *See* §2D1.1, comment. (n. 5). In determining the most closely related controlled substance, the commentary directs the court to consider (1) whether the controlled substance not referenced in §2D1.1 has a chemical structure that is substantially similar to a controlled substance that is referenced in §2D1.1, (2) whether the controlled substance not referenced in §2D1.1 has a stimulant, depressant, or hallucinogenic effect similar to a controlled substance referenced in the guideline, and (3) whether a lesser or greater quantity of the controlled substance not referenced in §2D1.1 is needed to produce a substantially similar effect as a controlled substance that is referenced in §2D1.1.

In applying these factors, courts have reached different conclusions regarding which controlled substance referenced in §2D1.1 is most closely related to BZP and have therefore used different marijuana equivalencies in sentencing BZP offenders. The Commission's review of case law and sentencing data indicate that some district courts have found that the controlled substance most closely related to BZP is amphetamine and used the marijuana equivalency for amphetamine, *see United States v. Major*, 801 F. Supp. 2d 511, 514 (E.D. Va. 2011) (using the marijuana equivalency for amphetamine at full potency), while other district courts have found that the controlled substance most related to BZP is MDMA, but at varying potencies. *See United States v. Bennett*, 659 F.3d 711, 715–16 (8th Cir. 2011) (affirming a district court's use of the marijuana equivalency for MDMA at full potency); *United States v. Rose*, 722 F. Supp. 2d 1286, 1289 (M.D. Ala. 2010) (concluding that BZP is most closely related to MDMA, but imposing a variance to reflect BZP's reduced potency compared to MDMA). The different findings of which

controlled substance is the most closely related to BZP, and the application of different potencies of those controlled substances, have resulted in courts imposing vastly different sentence lengths for the same conduct.

The Commission reviewed scientific literature and received expert testimony and comment relating to BZP and concluded that BZP is a stimulant with pharmacologic properties similar to that of amphetamine, but is only one-tenth to one-twentieth as potent as amphetamine, depending on the particular user's history of drug abuse. Accordingly, in order to promote uniformity in sentencing BZP offenders and to reflect the best available scientific evidence, the amendment establishes a marijuana equivalency of 1 gram of BZP equals 100 grams of marijuana. This corresponds to one-twentieth of the marijuana equivalency for amphetamine, which is 1 gram of amphetamine equals 2 kilograms (or 2,000 grams) of marijuana.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 763

AMENDMENT: Section 2D1.11 is amended in subsection (b) by adding at the end the following:

"(6) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.".

The Commentary to 2D1.11 captioned "Application Notes" is amended by adding at the end the following:

"9. *Applicability of Subsection (b)(6).*—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. *See* §5C1.2(b)(2)(requiring a minimum offense level of level 17 if the 'statutorily required minimum sentence is at least five years').".

REASON FOR AMENDMENT: This amendment adds a new specific offense characteristic at subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) that provides a 2-level decrease if the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) (commonly referred to as the "safety valve" criteria). The new specific offense characteristic in §2D1.11 parallels the existing 2-level decrease at subsection (b)(16) of §2D1.1(Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

The Commission in 1995 created the 2-level reduction in §2D1.1 for offenders who meet the safety valve criteria in response to a directive in section 80001 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322. Section 80001 provided an exception to otherwise applicable statutory minimum sentences for defendants convicted of specified drug offenses and who meet the criteria specified in 18 U.S.C. § 3553(f)(1)–(5), and directed the Commission to promulgate guidelines to carry out these purposes. The reduction in §2D1.1 initially was limited to defendants whose offense level was level 26 or greater, *see* USSG App. C, Amendment 515 (effective November 1, 1995), but was subsequently expanded to apply to offenders with an offense level lower than level 26 to address proportionality concerns. *See* USSG App. C, Amendment 624 (effective November 1, 2001). Specifically, the Commission determined that limiting the applicability of the reduction to defendants with an

offense level of level 26 or greater "is inconsistent with the general principles underlying the two-level reduction . . . to provide lesser punishment for first time, nonviolent offenders." *Id*.

For similar reasons of proportionality, this amendment expands application of the 2-level reduction to offenses involving list I and list II chemicals sentenced under §2D1.11. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product, while list II chemicals are generally used as solvents, catalysts, and reagents. *See* USSG §2D1.11, comment. (backg'd.). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product. The Commission determined that adding the 2-level reduction for meeting the safety valve criteria in §2D1.11 would promote the proportionality the Commission has intended to achieve between §§2D1.1 and 2D1.11.

The amendment also adds new commentary relating to the "safety valve" reduction in §2D1.11 that is consistent with the commentary relating to the "safety valve" reduction in §2D1.1. *See* USSG §2D1.1, comment. (n. 21). The commentary makes clear that the new 2-level reduction in §2D1.11 applies regardless of the offense of conviction, and that the minimum offense level of 17 in subsection (b) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) does not apply. Section 5C1.2(b) provides for an offense level not less than level 17 for defendants who meet the criteria of subdivisions (1) – (5) of section (a) in §5C1.2 and for whom the statutorily required minimum sentence is at least 5 years. *See* USSG App. C, Amendment 624 (effective November 1, 2001). Since none of the offenses referenced to §2D1.11 carries a statutory mandatory minimum, the minimum offense level of 17 at §5C1.2(b) does not affect application of the new 2-level reduction in §2D1.11.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 764

AMENDMENT: The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1(B)(vii) by inserting before the period at the end the following: ", but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States".

REASON FOR AMENDMENT: This amendment responds to a circuit conflict over the application of the enhancements found at §2L1.2(b)(1)(A) and (B) to a defendant who was sentenced on two or more occasions for the same drug trafficking conviction (*e.g.*, because of a revocation of probation, parole, or supervised release), such that there was a sentence imposed before the defendant's deportation, then an additional sentence imposed after the deportation. The amendment resolves the conflict by amending the definition of "sentence imposed" in Application Note 1(B)(vii) to §2L1.2 (Unlawfully Entering or Remaining in the United States) to state that the length of the sentence imposed includes terms of imprisonment given upon revocation of probation, parole, or supervised release, but "only if the revocation occurred before the defendant was deported or unlawfully remained in the United States."

Section 2L1.2(b)(1) generally reflects the Commission's determination that both the seriousness and the timing of the prior offense for which the defendant was deported are relevant to assessing the defendant's culpability for the illegal reentry offense. A defendant who was deported after a conviction for a felony drug trafficking offense receives an enhancement under either prong (A) or (B) of subsection (b)(1), depending on the length of the sentence imposed. If the sentence imposed was more than 13 months, the defendant receives a 16-level enhancement to the base offense level under prong (A). If the sentence imposed was 13 months or less, the defendant receives a 12-level enhancement under prong (B). However, for defendants

whose prior convictions are remote in time and thus do not receive criminal history points, these enhancements are reduced to 12 levels and 8 levels, respectively.

The majority of circuits that have considered the meaning of "sentence imposed" in this context have held that the later, additional sentence imposed after deportation does not lengthen the sentence imposed for purposes of the subsection (b)(1) enhancement. *See United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010); *United States v. Lopez*, 634 F.3d 948 (7th Cir. 2011); *United States v. Rosales-Garcia*, 667 F.3d 1348 (10th Cir. 2012); *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000). Under the majority approach, if the sentence imposed was 13 months or less before the defendant was deported, and was only increased to more than 13 months after the deportation, the defendant is not subject to the enhancement in prong (A) because the "sentence imposed" includes only the sentence imposed before the deportation. Under this approach, such a defendant receives the enhancement in prong (B) instead.

The Second Circuit has reached the contrary conclusion, holding that defendants who had their sentences increased to more than 13 months upon revocation after deportation are subject to the enhancement in prong (A) because the "sentence imposed" includes the additional revocation sentence imposed after deportation. *See United States v. Compres-Paulino*, 393 F.3d 116 (2d Cir. 2004).

The amendment adopts the approach taken by the majority of circuits, with the result that the term of imprisonment imposed upon revocation counts toward the calculation of the offense level in §2L1.2 only if it was imposed before the defendant was deported or unlawfully remained in the United States. According to public comment and testimony received by the Commission, and as courts have observed, the circumstances under which persons are found present in this country and have their probation, parole, or supervised release revoked for a prior offense vary widely. *See Bustillos-Pena*, 612 F.3d at 867–68 (describing differences among revocation proceedings). In some jurisdictions, the revocation is typically based on the offender's illegal return, while in others, the revocation is typically based on the offender's committing an additional crime. Furthermore, in some cases revocation proceedings commonly occur before the offender is sentenced on the illegal reentry offense, while in other cases the revocation occurs after the federal sentencing. *See Rosales-Garcia*, 667 F.3d at 1354 (observing that considering post-deportation revocation sentences could result in disparities based on the "happenstance" of whether that revocation occurred before or after the prosecution for the illegal reentry offense). Therefore, assessing the seriousness of the prior crime based on the sentence imposed before deportation should result in more consistent application of the enhancements in §2L1.2(b)(1)(A) and (B) and promote uniformity in sentencing.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 765

AMENDMENT: Section 2L2.2 is amended in subsection (b) by adding at the end the following:

"(4) (Apply the Greater):

(A) If the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the

period in which the defendant was such a member or had such authority, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(B) If the defendant committed any part of the instant offense to conceal the defendant's participation in (i) the offense of incitement to genocide, increase by 6 levels; or (ii) any other serious human rights offense, increase by 10 levels. If clause (ii) applies and the resulting offense level is less than level 25, increase to level 25.".

The Commentary to 2L2.2 captioned "Application Notes" is amended by redesignating Notes 4 and 5 as Notes 5 and 6, respectively; and by inserting after Note 3 the following:

"4. *Application of Subsection (b)(4).*—For purposes of subsection (b)(4):

'Serious human rights offense' means (A) violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code, *see* 28 U.S.C. § 509B(e); and (B) conduct that would have been a violation of any such law if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

'The offense of incitement to genocide' means (A) violations of 18 U.S.C. § 1091(c); and (B) conduct that would have been a violation of such section if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.".

Chapter Three, Part A is amended by adding at the end the following new guideline and accompanying commentary:

"§3A1.5. *Serious Human Rights Offense*

If the defendant was convicted of a serious human rights offense, increase the offense level as follows:

(a) If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), increase by 2 levels.

(b) If the defendant was convicted of any other serious human rights offense, increase by 4 levels. If (1) death resulted, and (2) the resulting offense level is less than level 37, increase to level 37.

Commentary

Application Notes:

1. *Definition.*—For purposes of this guideline, 'serious human rights offense' means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. *See* 28 U.S.C. § 509B(e).

2. *Application of Minimum Offense Level in Subsection (b).*—The minimum offense level in subsection (b) is cumulative with any other provision in the guidelines. For example, if death resulted and this factor was specifically incorporated into the Chapter Two offense guideline, the minimum offense level in subsection (b) may also apply.

Background: This guideline covers a range of conduct considered to be serious human rights offenses, including genocide, war crimes, torture, and the recruitment or use of child soldiers. *See* generally 28 U.S.C. § 509B(e).

Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. *See* 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. *See* 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. *See* 18 U.S.C. § 1091(c).".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2425 the following:

"18 U.S.C. § 2441 2X5.1".

Reason for Amendment: This amendment results from the Commission's multi-year review to ensure that the guidelines provide appropriate guidelines penalties for cases involving human rights violations. This amendment addresses human rights violators in two areas: defendants who are convicted of a human rights offense, and defendants who are convicted of immigration or naturalization fraud to conceal the defendant's involvement, or possible involvement, in a human rights offense.

Serious Human Rights Offenses

First, the amendment addresses defendants whose instant offense of conviction is a "serious human rights offense." In the Human Rights Enforcement Act of 2009, Pub. L. 111–122 (Dec. 22, 2009), Congress defined "serious human rights offenses" as "violations of Federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code." In that legislation, Congress authorized a new section within the Department of Justice "with responsibility for the enforcement of laws against suspected participants in [such] offenses." That section was established the following year, when the Human Rights and Special Prosecutions Section was created in the Justice Department's Criminal Division. Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. *See* 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. *See* 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. *See* 18 U.S.C. § 1091(c).

Serious human rights offenses can be committed in a variety of ways, including, for example, assault, kidnapping, and murder. As a result, the guidelines generally have addressed these offenses by referencing them to a number of different Chapter Two offense guidelines, such as §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault) and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint). In addition, certain of these Chapter Two offense guidelines use as a base offense level the offense level from another guideline applicable to the underlying conduct (*e.g.*, §2H1.1 (Offenses Involving Individual Rights), which is the guideline to which genocide offenses are referenced). The offense of committing a war crime in violation of 18 U.S.C. § 2441, however, has not been referenced to any guideline prior to this amendment. The amendment amends Appendix A (Statutory Index) to reference these offenses to §2X5.1 (Other Felony Offenses). Section 2X5.1 addresses the variety of ways in which a war crimes

offense may be committed by generally directing the court to apply the most analogous offense guideline.

The amendment also establishes a new Chapter Three adjustment at §3A1.5 (Serious Human Rights Offense) if the defendant was convicted of a serious human rights offense. The new guideline provides two tiers of adjustments, corresponding to the differing statutory penalties that apply to such offenses. The adjustment generally provides a 4-level increase if the defendant was convicted of a serious human rights offense, and a minimum offense level of 37 if death resulted. If the defendant was convicted of an offense under 18 U.S.C. § 1091(c) for inciting genocide, however, the adjustment provides a 2-level increase in light of the lesser statutory maximum penalty such offenses carry compared to the other offenses covered by this adjustment.

The new Chapter Three adjustment accounts for the particularly egregious nature of serious human rights offenses while generally maintaining the proportionality provided by the various Chapter Two guidelines that cover such offenses.

Immigration Fraud

Second, the amendment addresses cases in which the offense of conviction is for immigration or naturalization fraud and the defendant committed any part of the instant offense to conceal the defendant's involvement, or possible involvement, in a serious human rights offense. These offenders are sentenced under §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). The offenders covered by this amendment fall into two categories. In the first category are defendants who concealed their connection to a military, paramilitary, or police organization that was involved in a serious human rights offense. In the second category are defendants who concealed having participated in a serious human rights offense.

The amendment adds a new specific offense characteristic to §2L2.2 at subsection (b)(4) that contains two subparagraphs. Subparagraph (A) applies if the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, and provides a 2-level increase and a minimum offense level of 13. Subparagraph (B) applies if the defendant committed any part of the instant offense to conceal the defendant's participation in a serious human rights offense, and provides a 6-level increase if the offense was incitement to genocide, or a 10-level increase and minimum offense level of 25 if the offense was any other serious human rights offense. The amendment also adds an application note defining the terms "serious human rights offense" and "the offense of incitement to genocide."

The new enhancement reflects the impact that such immigration fraud offenses can have on the ability of immigration and naturalization authorities to make fully informed decisions regarding the defendant's immigration petition, application or other request and is intended to ensure that the United States is not a safe haven for those who have committed serious human rights offenses.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 766

AMENDMENT: The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 5 by striking "counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c)." and inserting "always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.".

REASON FOR AMENDMENT: This amendment resolves differences among circuits regarding when prior sentences for the misdemeanor offenses of driving while intoxicated and driving under the influence (and any similar offenses by whatever name they are known) are counted toward the defendant's criminal history score.

Convictions for driving while intoxicated and similar offenses encompass a range of offense conduct. For example, convictions for driving while intoxicated and similar offenses can be classified as anything from traffic infractions to misdemeanors and felonies, and they are subject to a broad spectrum of penalties (ranging from a fine to years in custody for habitual offenders). When the prior offense is a felony, the sentence clearly counts toward the defendant's criminal history score because "[s]entences for all felony offenses are counted." *See* subsection (c) of §4A1.2 (Definitions and Instructions for Computing Criminal History). However, when the prior sentence is for a misdemeanor or petty offense, circuits have taken different approaches, in part because of language added to §4A1.2(c)(1). *See* USSG App. C, Amendment 352 (effective November 1, 1990) (adding "careless or reckless driving" to the offenses listed in §4A1.2(c)(1)).

When the prior sentence is a misdemeanor or petty offense, §4A1.2(c) specifies that the offense is counted, but with two exceptions, limited to cases in which the prior offense is on (or similar to an offense that is on) either of two lists. On the first list are offenses from "careless or reckless driving" to "trespassing." In such a case, the sentence is counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least 30 days, or (B) the prior offense was similar to the instant offense. *See* §4A1.2(c)(1). On the second list are offenses from "fish and game violations" to "vagrancy." In such a case, the sentence is never counted. *See* §4A1.2(c)(2).

Most circuits have held that driving while intoxicated convictions, including misdemeanors and petty offenses, always count toward the criminal history score, without exception, even if the offense met the criteria for either of the two lists. These circuits have relied on Application Note 5 to §4A1.2, which has provided:

> *Sentences for Driving While Intoxicated or Under the Influence.*—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).

See United States v. Pando, 545 F.3d 682, 683–85 (8th Cir. 2008) (holding that a conviction for driving while ability impaired was properly included in defendant's criminal history, and rejecting defendant's argument that his offense was similar to careless or reckless driving); *United States v. Thornton*, 444 F.3d 1163, 1165–67 (9th Cir. 2006) (holding that driving with high blood alcohol level was properly included in defendant's criminal history, and rejecting defendant's argument that his conviction was "similar" to minor traffic infraction or public intoxication). *See also United States v. LeBlanc*, 45 F.3d 192, 195 (7th Cir. 1995) ("[A]pplication note [5] reflects the Sentencing Commission's conclusion 'that driving while intoxicated offenses are of sufficient gravity to merit inclusion in the defendant's criminal history, however they might be classified under state law.'"); *United States v. Deigert*, 916 F.2d 916, 918

(4th Cir. 1990) (holding that defendant's alcohol-related traffic offenses are counted under Application Note 5).

The Second Circuit took a different approach in *United States v. Potes-Castillo*, 638 F.3d 106 (2d Cir. 2011), holding that Application Note 5 could be read either (1) to "mean that, like felonies, driving while ability impaired sentences are always counted, without possibility of exception" or (2) "as setting forth the direction that driving while ability impaired sentences must not be treated as minor traffic infractions or local ordinance violations and excluded under section 4A1.2(c)(2)." *Id*. at 110–11. The Second Circuit adopted the second reading and, accordingly, held that a prior sentence for driving while ability impaired "should be treated like any other misdemeanor or petty offense, except that they cannot be exempted under section 4A1.2(c)(2)." *Id*. at 113. According to the Second Circuit, such a sentence can qualify for an exception, and therefore not be counted, under the first list (*e.g.*, if it was similar to "careless or reckless driving" and the other criteria for a first-list exception were met).

The amendment resolves the issue by amending Application Note 5 to clarify that convictions for driving while intoxicated and similar offenses are always counted, without regard to how the offenses are classified. Further, the amendment states plainly that paragraphs (1) and (2) of §4A1.2(c) do not apply.

This amendment reflects the Commission's view that convictions for driving while intoxicated and other similar offenses are sufficiently serious to always count toward a defendant's criminal history score. The amendment clarifies the Commission's intent and should result in more consistent calculation of criminal history scores among the circuits.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 767

AMENDMENT: Section 5G1.2 is amended in subsection (b) by striking "Except as otherwise required by law (*see* §5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter." and inserting "For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.".

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 1, in the first paragraph, by inserting before the period at the end of the first sentence the following: "and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table)"; and

after the first paragraph, by inserting the following new paragraph:

"Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See* Note 3, below."; and

by redesignating Note 3 as Note 4 and inserting after Note 2 the following:

"3. *Application of Subsection (b).*—

(A) *In General*.—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (*i.e.*, the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).

(B) *Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum*.—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. *See* §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. *See* §5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. *See* §5G1.1(a).

(C) *Examples*.—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. *See* subparagraph (B), above. After considering that guideline sentence, the court determines that the appropriate 'total punishment' to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B's guideline range is restricted to 120 to 135 months. *See* subparagraph (B), above. After

considering that restricted guideline range, the court determines that the appropriate 'total punishment' to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

(D) *Special Rule on Resentencing*.—In a case in which (i) the defendant's guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant's guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.".

REASON FOR AMENDMENT: This amendment responds to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. The issue arises under §5G1.2 (Sentencing on Multiple Counts of Conviction) when at least one count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range. In such cases, circuits differ over whether the guideline range is affected only for the count involving the mandatory minimum or for all counts in the case.

The Fifth Circuit has held that, in such a case, the effect on the guideline range applies to all counts in the case. *See United States v. Salter*, 241 F.3d 392, 395–96 (5th Cir. 2001). In that case, the guideline range on the Sentencing Table was 87 to 108 months, but one of the three counts carried a mandatory minimum sentence of 10 years (120 months), which resulted in a guideline sentence of 120 months. The Fifth Circuit instructed the district court that the appropriate guideline sentence was 120 months on each of the three counts.

The Ninth Circuit took a different approach in *United States v. Evans-Martinez*, 611 F.3d 635 (9th Cir. 2010), holding that, in such a case, "a mandatory minimum sentence becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range," but "[a]ll other counts . . . are sentenced based on the Guidelines sentencing range, regardless [of] the mandatory minimum sentences that apply to other counts." *See id*. at 637. The Ninth Circuit stated that it would be more "logical" to follow the Fifth Circuit's approach but "such logic is overcome by the precise language of the Sentencing Guidelines." *See id*.

The District of Columbia Circuit appears to follow an approach similar to the Ninth Circuit. *See United States v. Kennedy*, 133 F.3d 53, 60–61 (D.C. Cir. 1998) (one of two counts carried a mandatory sentence of life imprisonment; district court treated life imprisonment as the guidelines sentence for both counts; Court of Appeals reversed, holding that the appropriate guidelines range for the other count was 262 to 327 months).

The amendment adopts the approach followed by the Fifth Circuit and makes three changes to §5G1.2. First, it amends §5G1.2(b) to clarify that the court is to determine the total punishment and impose that total punishment on each count, except to the extent otherwise required by law.

Second, it amends the Commentary to clarify that the defendant's guideline range in a multiple-count case may be restricted by a mandatory minimum penalty or statutory maximum penalty (*i.e.*, a mandatory minimum may increase the bottom of the otherwise applicable

guideline range and a statutory maximum may decrease the top of the otherwise applicable guideline range) in a manner similar to how the guideline range in a single-count case may be restricted by a minimum or maximum penalty under §5G1.1 (Sentencing on a Single Count of Conviction). Specifically, it clarifies that when any count involves a mandatory minimum that restricts the defendant's guideline range, the guideline range is restricted as to all counts. It also provides examples of how these restrictions operate.

Third, it amends the commentary to clarify that in a case in which (1) a defendant's guideline range was affected or restricted by a mandatory minimum penalty, (2) the court is resentencing the defendant, and (3) the mandatory minimum sentence no longer applies, the court shall redetermine the defendant's guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

These changes resolve the application issue by clarifying the manner in which the Commission intended this guideline to operate, and by providing examples similar to those used in training probation officers and judges. When there is only one count, the guidelines provide a single guideline range, and that range may be restricted if a mandatory minimum is involved, as described in §5G1.1 (Sentencing on a Single Count of Conviction). When there is more than one count, the guidelines also provide a single guideline range, and that range also may be restricted if a mandatory minimum is involved. These changes provide clarity and consistency for cases in which a mandatory minimum is present and are intended to ensure that sentencing courts resolve multiple-count cases in a straightforward, logical manner, with a single guideline range, a single set of findings and reasons, and a single set of departure and variance considerations.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 768

AMENDMENT: Chapter Five, Part K, Subpart 2 is amended by striking §5K2.19 and its accompanying commentary as follows:

"§5K2.19. *Post-Sentencing Rehabilitative Efforts* (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*.".

REASON FOR AMENDMENT: The Commission's policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement) prohibits the consideration of post-sentencing reha-

bilitative efforts as a basis for downward departure when resentencing a defendant. Section 5K2.19 was promulgated in 2000 in response to a circuit conflict regarding whether sentencing courts may consider such rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. *See* USSG App. C, Amendment 602 (effective November 1, 2000). This amendment repeals §5K2.19. The amendment responds to the Supreme Court's decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), which, in part relying on 18 U.S.C. § 3661, held among other things that "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation." The amendment repeals the policy statement in light of the *Pepper* decision.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 769

AMENDMENT: Section 2P1.2 is amended in subsection (a)(3) by inserting after "currency," the following: "a mobile phone or similar device,".

The Commentary to §2P1.2 captioned "Application Notes" is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively, and by inserting at the beginning the following:

"1. In this guideline, the term 'mobile phone or similar device' means a phone or other device as described in 18 U.S.C. § 1791(d)(1)(F).".

The Commentary to §2T2.1 captioned "Statutory Provisions" is amended by inserting "15 U.S.C. § 377," before "26 U.S.C.".

The Commentary to §2T2.2 captioned "Statutory Provisions" is amended by inserting "15 U.S.C. § 377," before "26 U.S.C.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. § 158 the following:

"15 U.S.C. § 377 2T2.1, 2T2.2";

by inserting after the line referenced to 18 U.S.C. § 43 the following:

"18 U.S.C. § 48 2G3.1";

by inserting after the line referenced to 18 U.S.C. § 1153 the following:

"18 U.S.C. § 1158 2B1.1, 2B5.3

18 U.S.C. § 1159 2B1.1";

by inserting after the line referenced to 18 U.S.C. § 1716D the following:

"18 U.S.C. § 1716E 2T2.2"; and

by striking the lines referenced to 41 U.S.C. § 53, 54, and 423(e) as follows:

"41 U.S.C. § 53 2B4.1

41 U.S.C. § 54	2B4.1
41 U.S.C. § 423(e)	2B1.1, 2C1.1";

and by inserting the following:

"41 U.S.C. § 2102	2B1.1, 2C1.1
41 U.S.C. § 2105	2B1.1, 2C1.1
41 U.S.C. § 8702	2B4.1
41 U.S.C. § 8707	2B4.1".

REASON FOR AMENDMENT: This amendment responds to miscellaneous issues arising from recently enacted legislation.

Cell Phone Contraband Act of 2010

First, the amendment responds to the Cell Phone Contraband Act of 2010, Pub. L. 111–225 (enacted August 10, 2010), which amended 18 U.S.C. § 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device. Offenses under section 1791 are referenced in Appendix A (Statutory Index) to §2P1.2 (Providing or Possessing Contraband in Prison). The penalty structure of section 1791 is based on the type of contraband involved, and the other class A misdemeanors in section 1791 receive a base offense level of 6 in §2P1.2. Under the amendment, the class A misdemeanor in section 1791 that applies when the contraband is a cell phone will also receive a base offense level of 6 in §2P1.2. This change maintains the relationship between the penalty structures of the statute and the guideline.

Prevent All Cigarette Trafficking Act of 2009

Second, the amendment responds to the Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Pub. L. 111–154 (enacted March 31, 2010). The PACT Act made a series of revisions to the Jenkins Act, 15 U.S.C. § 375 *et seq.*, which is one of several laws governing the sale, shipment and taxation of cigarettes and smokeless tobacco.

The PACT Act raised the criminal penalty at 15 U.S.C. § 377 for a knowing violation of the Jenkins Act from a misdemeanor to a felony with a statutory maximum term of imprisonment of 3 years. The amendment amends Appendix A (Statutory Index) to reference section 377 offenses to §2T2.1 (Non-Payment of Taxes) and §2T2.2 (Regulatory Offenses). These two guidelines are the most analogous guidelines for a section 377 offense because the offense may involve either non-payment of taxes or regulatory offenses. Accordingly, the amendment also amends the Commentary to §§2T2.1 and 2T2.2 to add section 377 to their lists of statutory provisions. These lists indicate that §2T2.1 applies if the conduct constitutes non-payment, evasion, or attempted evasion of taxes, and §2T2.2 applies if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes.

The PACT Act also created a new class A misdemeanor at 18 U.S.C. § 1716E, prohibiting the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The amendment amends Appendix A (Statutory Index) to reference section 1716E offenses to §2T2.2. Section 2T2.2 is the most analogous guideline because offenses under section 1716E are regulatory offenses.

Animal Crush Video Prohibition Act of 2010

Third, the amendment responds to the Animal Crush Video Prohibition Act of 2010, Pub. L. 111–294 (enacted December 9, 2010), which substantially revised the criminal offense at 18 U.S.C. § 48 (Animal crush videos). Section 48 makes it a crime to create or distribute an "animal crush video," which is defined by the statute in a manner that requires, among other things, that the depiction be obscene. The maximum term of imprisonment for a section 48 offense is 7 years. The amendment amends Appendix A (Statutory Index) to reference section 48 offenses to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). Section 2G3.1 is the most analogous guideline because obscenity is an element of section 48 offenses.

Indian Arts and Crafts Amendments Act of 2010

Fourth, the amendment responds to the Indian Arts and Crafts Amendments Act of 2010, Pub. L. 111–211 (enacted July 29, 2010), which amended the criminal offense at 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to reduce penalties for first offenders when the value of the goods involved is less than $1,000. The maximum term of imprisonment under section 1159 had been 5 years for a first offender and 15 years for a repeat offender. The Act retained this penalty structure, except that the statutory maximum term of imprisonment for a first offender was reduced to 1 year in a case in which the value of the goods involved is less than $1,000. The amendment amends Appendix A (Statutory Index) to reference section 1159 offenses to §2B1.1 (Theft, Property Destruction, and Fraud). Section 2B1.1 is the most analogous guideline because an offense under section 1159 has elements of fraud and deceit.

The amendment also addresses an existing offense, 18 U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark), which makes it a crime to counterfeit or unlawfully affix a Government trademark used or devised by the Indian Arts and Crafts Board or to make any false statement for the purpose of obtaining the use of any such mark. The maximum term of imprisonment under section 1158 is 5 years for a first offender and 15 years for a repeat offender. The amendment amends Appendix A (Statutory Index) to reference section 1158 offenses to both §§2B1.1 and 2B5.3 (Criminal Infringement of Copyright or Trademark). These two guidelines are the most analogous guidelines because an offense under section 1158 contains alternative sets of elements, one of which involves trademark infringement and one of which involves false statements.

Public Contracting Offenses

Finally, the amendment responds to Public Law 111–350 (enacted January 4, 2011), which enacted certain laws relating to public contracts as a new positive-law title of the Code—title 41, "Public Contracts." As part of this codification, two criminal offenses, 41 U.S.C. §§ 53 and 423(a)–(b), and their respective penalty provisions, 41 U.S.C. §§ 54 and 423(e), were given new title 41 section numbers: sections 8702 and 8707 for sections 53 and 54, respectively, and sections 2102 and 2105 for sections 423(a)–(b) and 423(e), respectively. The substantive offenses and their related penalties did not change. The amendment makes changes to Appendix A (Statutory Index) to reflect the renumbering and includes a reference for the new section 2102, whose predecessor section 423(a)–(b) was not referenced in Appendix A. The changes are technical.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 770

AMENDMENT: The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 4 by striking "Application Note 10 to §2D1.1" and inserting "the Drug Equivalency Tables in the Commentary to §2D1.1 (*see* §2D1.1, comment. (n.8))".

The Commentary to §2D1.1 captioned "Application Notes" is amended by renumbering Notes 1 through 29 according to the following table:

Before Amendment	*After Amendment*
1	1
17	2
13	3
2	4
12	5
5	6
6	7
10	8
11	9
15	10
3	11
18	12
23	13
25	14
26	15
27	16
28	17
19	18(A)
20	18(B)
29	19
21	20

24	21
8	22
7	23
22	24
4	25
14	26(A)
16	26(B)
9	26(C);

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.1 captioned "Application Notes", as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

Note	*Heading to Be Inserted at the Beginning*
1	*"Mixture or Substance".*—
2	*"Plant".*—
3	*Classification of Controlled Substances.*—
4	*Applicability to "Counterfeit" Substances.*—
5	*Determining Drug Types and Drug Quantities.*—
7	*Multiple Transactions or Multiple Drug Types.*—
9	*Determining Quantity Based on Doses, Pills, or Capsules.*—
10	*Determining Quantity of LSD.*—
12	*Application of Subsection (b)(5).*—
18	*Application of Subsection (b)(13).*—
23	*Cases Involving Mandatory Minimum Penalties.*—
25	*Cases Involving "Small Amount of Marihuana for No Remuneration".*—
26	*Departure Considerations.*—
26(A)	*Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.*—
26(B)	*Upward Departure Based on Drug Quantity.*—

26(C) *Upward Departure Based on Unusually High Purity*.—

The Commentary to §2D1.1 captioned "Application Notes", as so renumbered and rearranged and amended, is further amended as follows (with Notes referred to by their new numbers):

in Note 8(A) by striking "Note 5" and inserting "Note 6";

in Note 15 by redesignating (i), (ii), and (iii) as (A), (B), and (C), respectively;

in Note 18(A) by inserting before the period at the end of the heading the following: "(Subsection (b)(13)(A))"; and

in Note 18(B) by inserting before the period at the end of the heading the following: "(Subsection (b)(13)(C)B(D))", by redesignating its component subdivision (A) (beginning "Factors to Consider") as (i), and that subdivision's component subdivisions (i) through (iv) as (I) through (IV), respectively, and by redesignating its component subdivision (B) (beginning "Definitions") as (ii).

The Commentary to §2D1.1 captioned "Background" is amended by striking the fifth through eighth undesignated paragraphs as follows:

" The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).";

in the paragraph beginning "The dosage weight" by striking "111 S.Ct. 1919" and inserting "500 U.S. 453"; and

by inserting before the paragraph beginning "Subsection (b)(11)" the following:

" Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.".

The Commentary to §2D1.6 captioned "Application Note" is amended in Note 1 by striking "Note 12" and inserting "Note 5".

Amendment 770

The Commentary to §2D1.11 captioned "Application Notes", as amended by Amendment 763, is further amended by renumbering Notes 1 through 9 according to the following table:

Before Amendment	*After Amendment*
4	1
1	2
5	3
6	4
7	5
8	6
9	7
2	8
3	9;

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.11 captioned "Application Notes", as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

Note	*Heading to Be Inserted at the Beginning*
2	*Application of Subsection (b)(1).*—
3	*Application of Subsection (b)(2).*—
4	*Application of Subsection (b)(3).*—
8	*Application of Subsection (c)(1).*—
9	*Offenses Involving Immediate Precursors or Other Controlled Substances Covered Under §2D1.1.*—

The Commentary to §2D1.11 captioned "Application Notes", as so renumbered and rearranged and amended, is further amended in Note 9 (as so renumbered) by striking "Note 12" and inserting "Note 5".

The Commentary to §5G1.2 captioned "Application Notes", as amended by Note 767, is further amended by amending Note 1 to read as follows:

"1. *In General.*—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ('total punishment') is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining

the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See* Note 3, below.

Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.".

Section 5K2.0 is amended in subsection (d)(1) by striking "the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts)" and inserting "and the last sentence of 5K2.12 (Coercion and Duress)".

REASON FOR AMENDMENT: This amendment makes certain technical and conforming changes to commentary in the *Guidelines Manual*.

First, it reorganizes the commentary to the drug trafficking guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The amendment also makes stylistic changes to the Commentary to §2D1.1, such as by adding headings to certain application notes. To reflect the renumbering of application notes in §2D1.1, conforming changes are also made to the Commentary to §1B1.10 and §2D1.6.

Second, it makes certain clerical and stylistic changes in connection with certain recently promulgated amendments. *See* 77 Fed. Reg. 28226 (May 11, 2012). The clerical and stylistic changes are as follows:

(1) Amendment 763 made revisions to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). This amendment reorganizes the commentary to §2D1.11 so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The amendment also makes stylistic changes to the Commentary to §2D1.11 by adding headings to certain application notes.

(2) Amendment 767 made revisions to §5G1.2 (Sentencing on Multiple Counts of Conviction), including a revision to Application Note 1. However, the amendatory instructions published in the *Federal Register* to implement those revisions included an erroneous instruction. This amendment restates Application Note 1 in its entirety to ensure that

it conforms with the version of Application Note 1 that appears in the unofficial, "reader-friendly" version of Amendment 7 that the Commission made available in May 2012.

(3) Amendment 768 repealed the policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts). However, a reference to that policy statement is contained in §5K2.0 (Grounds for Departure). This amendment revises §5K2.0 to reflect the repeal of §5K2.19.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 771

AMENDMENT: Section 2B1.1(b) is amended by striking paragraph (5) as follows:

"(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.";

by renumbering paragraphs (6) through (8) as (5) through (7); by renumbering paragraphs (13) through (18) as (14) through (19); by inserting after paragraph (12) the following:

"(13) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.

If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14."; and

in paragraph (16) (as so renumbered) by striking "(b)(15)(B)" and inserting "(b)(16)(B)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 6 by striking "(b)(7)" both places it appears and inserting "(b)(6)"; in Note 10 by striking "(b)(13)" both places it appears and inserting "(b)(14)"; in Note 11 by striking "(b)(15)(A)" both places it appears and inserting "(b)(16)(A)"; in Note 12 by striking "(b)(15)(B)" and inserting "(b)(16)(B)"; in Note 12(A) by striking "(b)(15)(B)(i)" and inserting "(b)(16)(B)(i)"; in Note 12(B) by striking "(b)(15)(B)(ii)" and inserting "(b)(16)(B)(ii)"; in Note 13 by striking "(b)(17)" both places it appears and inserting "(b)(18)"; in Note 13(B) by striking "(b)(17)(A)(iii)" both places it appears and inserting "(b)(18)(A)(iii)", and by striking "(b)(15)(B)" both places it appears and inserting "(b)(16)(B)"; in Note 14 by striking "(b)(18)" each place it appears and inserting "(b)(19)"; and in Note 19(B) by striking "(b)(17)(A)(iii)" and inserting "(b)(18)(A)(iii)".

The Commentary to §2B1.1 captioned "Background" is amended by striking "(b)(6)", "(b)(8)", "(b)(14)(B)", "(b)(15)(A)", "(b)(15)(B)(i)", "(b)(16)", "(b)(17)", and "(b)(17)(B)" and inserting "(b)(5)", "(b)(7)", "(b)(15)(B)", "(b)(16)(A)", "(b)(16)(B)(i)", "(b)(17)", "(b)(18)", and "(b)(18)(B)", respectively; and by inserting before the paragraph that begins "Subsection (b)(15)(B)" (as so amended) the following:

" Subsection (b)(13) implements the directive in section 3 of Public Law 112–269.".

REASON FOR AMENDMENT: This amendment responds to section 3 of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112–269 (enacted January 14, 2013), which contains a directive to the Commission regarding offenses involving stolen trade secrets or economic espionage.

Section 3(a) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines "applicable to persons convicted of offenses relating to the transmission or attempted transmission of a stolen trade secret outside of the United States or economic espionage, in order to reflect the intent of Congress that penalties for such offenses under the Federal sentencing guidelines and policy statements appropriately reflect the seriousness of these offenses, account for the potential and actual harm caused by these offenses, and provide adequate deterrence against such offenses." Section 3(b) of the Act states that, in carrying out the directive, the Commission shall consider, among other things, whether the guidelines adequately address the simple misappropriation of a trade secret; the transmission or attempted transmission of a stolen trade secret outside of the United States; and the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent.

The offenses described in the directive may be prosecuted under 18 U.S.C. § 1831 (Economic espionage), which requires that the defendant specifically intend or know that the offense "will benefit any foreign government, foreign instrumentality, or foreign agent," and 18 U.S.C. § 1832 (Theft of trade secrets), which does not require such specific intent or knowledge. The statutory maximum terms of imprisonment are 15 years for a section 1831 offense and 10 years for a section 1832 offense. Both offenses are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

In response to the directive, the amendment revises the existing specific offense characteristic at §2B1.1(b)(5), which provides an enhancement of two levels "[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent," in two ways. First, it broadens the scope of the enhancement to provide a 2-level increase for trade secret offenses in which the defendant knew or intended that the trade secret would be transported or transmitted out of the United States. Second, it increases the severity of the enhancement to provide a 4-level enhancement and a minimum offense level of 14 for trade secret offenses in which the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent. The enhancement also is redesignated as subsection (b)(13).

In responding to the directive, the Commission consulted with individuals or groups representing law enforcement, owners of trade secrets, victims of economic espionage offenses, the United States Department of Justice, the United States Department of Homeland Security, the United States Department of State, the Office of the United States Trade Representative, the Federal Public and Community Defenders, and standing advisory groups, among others. The Commission also considered relevant data and literature.

The Commission received public comment and testimony that the transmission of stolen trade secrets outside of the United States creates significant obstacles to effective investigation and prosecution and causes both increased harm to victims and more general harms to the nation. With respect to the victim, civil remedies may not be readily available or effective, and the transmission of a stolen trade secret outside of the United States substantially increases the risk that the trade secret will be exploited by a foreign competitor. In contrast, the simple

movement of a stolen trade secret within a domestic multinational company (*e.g.*, from a United States office to an overseas office of the same company) may not pose the same risks or harms. More generally, the Commission heard that foreign actors increasingly target United States companies for trade secret theft and that such offenses pose a growing threat to the nation's global competitiveness, economic growth, and national security. Accordingly, the Commission determined that a 2-level enhancement is warranted for cases in which the defendant knew or intended that a stolen trade secret would be transported or transmitted outside of the United States.

The Commission also received public comment and testimony that cases involving economic espionage (*i.e.*, trade secret offenses that benefit foreign governments or entities under the substantial control of foreign governments) are particularly serious. In such cases, the United States is unlikely to obtain a foreign government's cooperation when seeking relief for the victim, and offenders backed by a foreign government likely will have significant financial resources to combat civil remedies. In addition, a foreign government's involvement increases the threat to the nation's economic and national security. Accordingly, the Commission determined that the existing enhancement for economic espionage should be increased from 2 to 4 levels and that such offenses should be subject to a minimum offense level of 14. This heightened enhancement is consistent with the higher statutory maximum penalties and fines applicable to such offenses and the Commission's established treatment of economic espionage as a more serious form of trade secret theft.

Consistent with the directive, the Commission also considered whether the guidelines appropriately account for the simple misappropriation of a trade secret. The Commission determined that such offenses are adequately accounted for by existing provisions in the *Guidelines Manual*, such as the loss table in §2B1.1(b)(1), the sophisticated means enhancement at §2B1.1(b)(10), and the adjustment for abuse of position of trust or use of special skill at §3B1.3.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 772

AMENDMENT: Section 2B1.1 is amended by inserting before paragraph (9) the following new paragraph:

"(8) (Apply the greater) If—

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.";

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Personal information' means" the following:

"'Pre-retail medical product' has the meaning given that term in 18 U.S.C. § 670(e).''; and by inserting after the paragraph that begins "'Publicly traded company' means" the following:

"'Supply chain' has the meaning given that term in 18 U.S.C. § 670(e).";

in Note 3(F)(i) by striking "Note 9(A)" and inserting "Note 10(A)"; and

by renumbering Notes 7 through 19 as 8 through 20; by inserting after Note 6 the following:

"7. *Application of Subsection (b)(8)(B).*—If subsection (b)(8)(B) applies, do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."; and

in Note 20 (as so renumbered) by adding at the end of subparagraph (A)(ii) as the last sentence the following: "Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.".

The Commentary to §2B1.1 captioned "Background" is amended by inserting before the paragraph that begins "Subsection (b)(9)(D)" the following:

" Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112–186.".

However, if §2B1.1(b) already contains a paragraph (8) because the renumbering of paragraphs by Amendment 771 has not taken effect, renumber the new paragraph inserted into §2B1.1(b) as paragraph (8A) rather than paragraph (8), and revise the Commentary so that the new Note 7 inserted into the Application Notes and the new paragraph inserted into the Background refer to subsection (b)(8A) rather than subsection (b)(8).

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 669 the following:

"18 U.S.C. § 670 2B1.1".

REASON FOR AMENDMENT: This amendment responds to the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. 112–186 (enacted October 5, 2012) (the "Act"), which addressed various offenses involving "pre-retail medical products," defined as "a medical product that has not yet been made available for retail purchase by a consumer." The Act created a new criminal offense at 18 U.S.C. § 670 for theft of pre-retail medical products, increased statutory penalties for certain related offenses when a pre-retail medical product is involved, and contained a directive to the Commission.

New Offense at 18 U.S.C. § 670

The new offense at section 670 makes it unlawful for any person in (or using any means or facility of) interstate or foreign commerce to—

(1) embezzle, steal, or by fraud or deception obtain, or knowingly and unlawfully take, carry away, or conceal a pre-retail medical product;

(2) knowingly and falsely make, alter, forge, or counterfeit the labeling or documentation (including documentation relating to origination or shipping) of a pre-retail medical product;

(3) knowingly possess, transport, or traffic in a pre-retail medical product that was involved in a violation of paragraph (1) or (2);

(4) with intent to defraud, buy, or otherwise obtain, a pre-retail medical product that has expired or been stolen;

(5) with intent to defraud, sell, or distribute, a pre-retail medical product that is expired or stolen; or

(6) attempt or conspire to violate any of paragraphs (1) through (5).

The offense generally carries a statutory maximum term of imprisonment of three years. If the offense is an "aggravated offense," however, higher statutory maximum terms of imprisonment are provided. The offense is an "aggravated offense" if—

(1) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or

(2) the violation—

(A) involves the use of violence, force, or a threat of violence or force;
(B) involves the use of a deadly weapon;
(C) results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or
(D) is subsequent to a prior conviction for an offense under section 670.

Specifically, the higher statutory maximum terms of imprisonment are:

(1) Five years, if—

(A) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or
(B) the violation (i) involves the use of violence, force, or a threat of violence or force, (ii) involves the use of a deadly weapon, or (iii) is subsequent to a prior conviction for an offense under section 670.

(2) 15 years, if the value of the medical products involved in the offense is $5,000 or greater.

(3) 20 years, if both (1) and (2) apply.

(4) 30 years, if the offense results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved.

The amendment amends Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. § 670 to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission concluded that §2B1.1 is the appropriate guideline because the elements of the new offense include theft or fraud.

Response to Directive

Section 7 of the Act directs the Commission to "review and, if appropriate, amend" the federal sentencing guidelines and policy statements applicable to the new offense and the related offenses "to reflect the intent of Congress that penalties for such offenses be sufficient to deter

and punish such offenses, and appropriately account for the actual harm to the public from these offenses." The amendment amends §2B1.1 to address offenses involving pre-retail medical products in two ways.

First, the amendment adds a new specific offense characteristic at §2B1.1(b)(8) that provides a two-pronged enhancement with an instruction to apply the greater. Prong (A) provides a 2-level enhancement if the offense involved conduct described in 18 U.S.C. § 670. Prong (B) provides a 4-level enhancement if the offense involved conduct described in 18 U.S.C. § 670 and the defendant was employed by, or an agent of, an organization in the supply chain for the pre-retail product. Accompanying this new specific offense characteristic is new Commentary providing that, if prong (B) applies, "do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

Based on public comment, testimony and sentencing data, the Commission concluded that an enhancement differentiating fraud and theft offenses involving medical products from those involving other products is warranted by the additional risk such offenses pose to public health and safety. In addition, such offenses undermine the public's confidence in the medical regulatory and distribution system. The Commission also concluded that the risks and harms it identified would be present in any theft or fraud offense involving a pre-retail medical product, regardless of the offense of conviction. Therefore application of the new specific offense characteristic is not limited to offenses charged under 18 U.S.C. § 670.

The amendment provides a 4-level enhancement for defendants who commit such offenses while employed in the supply chain for the pre-retail medical product. Such defendants are subject to an increased statutory maximum and the Commission determined that a heightened enhancement should apply to reflect the likelihood that the defendant's position in the supply chain facilitated the commission or concealment of the offense. Defendants who receive the 4-level enhancement are not subject to the adjustment at §3B1.3 because the new enhancement adequately accounts for the concerns covered by §3B1.3. The Commission determined that existing specific offense characteristics generally account for other aggravating factors included in the Act, such as loss, use or threat of force, risk of death or serious bodily injury, and weapon involvement, and therefore additional new specific offense characteristics are not necessary. *See, e.g.*, §§2B1.1(b)(1), (b)(3), and (b)(15) (as redesignated by the amendment).

Second, it amends the upward departure provisions in the Commentary to §2B1.1 at Application Note 19(A) to provide—as an example of a case in which an upward departure would be warranted—a case "involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product." Public comment and testimony indicated that §2B1.1 may not adequately account for the harm created by theft or fraud offenses involving pre-retail medical products when such serious bodily injury or death actually occurs as a result of the offense. For example, some pre-retail medical products are stolen as part of a scheme to re-sell them into the supply chain, but if the products have not been properly stored in the interim, their subsequent use can seriously injure the individual consumers who buy and use them. Thus, the amendment expands the scope of the existing upward departure provision to address such harms and to clarify that an upward departure is appropriate in such cases not only if serious bodily injury or death occurred during the theft or fraud, but also if such serious bodily injury or death resulted from the victim's use of a pre-retail medical product that had previously been obtained by theft or fraud.

Finally, the amendment amends the Commentary to §2B1.1 to provide relevant definitions and make other conforming changes.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 773

AMENDMENT: Section 2B5.3(b) is amended by renumbering paragraph (5) as (6); by inserting after paragraph (4) the following:

"(5) If the offense involved a counterfeit drug, increase by 2 levels."; and

by inserting after paragraph (6) (as so renumbered) the following:

"(7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.".

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Commercial advantage" the following:

"'Counterfeit drug' has the meaning given that term in 18 U.S.C. § 2320(f)(6).

"'Counterfeit military good or service' has the meaning given that term in 18 U.S.C. § 2320(f)(4).";

by renumbering Notes 3 and 4 as 4 and 5; by inserting after Note 2 the following:

"3. *Application of Subsection (b)(7).*—In subsection (b)(7), 'other significant harm to a member of the Armed Forces' means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(6)(A) (conscious or reckless risk of serious bodily injury or death) would apply."; and

in Note 5 (as so renumbered) by adding at the end the following:

"(D) The offense resulted in death or serious bodily injury.".

The Commentary to §2B5.3 captioned "Background" is amended by inserting after the paragraph that begins "Subsection (b)(1)" the following:

" Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.".

Appendix A (Statutory Index) is amended by striking the line referenced to 21 U.S.C. § 333(b) as follows:

"21 U.S.C. § 333(b) 2N2.1";

and inserting the following:

"21 U.S.C. § 333(b)(1)–(6) 2N2.1

21 U.S.C. § 333(b)(7) 2N1.1".

REASON FOR AMENDMENT: This amendment responds to two recent Acts that made changes to 18 U.S.C. § 2320 (Trafficking in counterfeit goods or services). One Act increased penalties for offenses involving counterfeit military goods and services; the other increased penalties for offenses involving counterfeit drugs and included a directive to the Commission. The amendment also responds to recent statutory changes to 21 U.S.C. § 333 (Penalties for violations of the Federal Food, Drug, and Cosmetics Act) that increase penalties for offenses involving intentionally adulterated drugs.

Section 2320 and Counterfeit Military Goods and Services

First, the amendment responds to changes to section 2320 made by the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81 (enacted December 31, 2011) (the "NDAA"). In general, section 2320 prohibits trafficking in goods or services using a counterfeit mark, and provides a statutory maximum term of imprisonment of 10 years, or 20 years for a second or subsequent offense. If the offender knowingly or recklessly causes or attempts to cause serious bodily injury or death, the statutory maximum is increased to 20 years or any term of years or life, respectively. Offenses under section 2320 are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark).

Section 818 of the NDAA amended section 2320 to add a new subsection (a)(3) that prohibits trafficking in counterfeit military goods and services, the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or national security. A "counterfeit military good or service" is defined as a good or service that uses a counterfeit mark and that (A) is falsely identified or labeled as meeting military specifications, or (B) is intended for use in a military or national security application. *See* 18 U.S.C. § 2320(f)(4). An individual who commits an offense under subsection (a)(3) is subject to a statutory maximum term of imprisonment of 20 years, or 30 years for a second or subsequent offense. *See* 18 U.S.C. § 2320(b)(3).

The legislative history of the NDAA indicates that Congress amended section 2320 because of concerns about national security and the protection of United States servicemen and women. After reviewing the legislative history, public comment, testimony, and data, the Commission determined that an offense involving counterfeit military goods and services that jeopardizes the safety of United States troops and compromises mission effectiveness warrants increased punishment.

Specifically, the amendment addresses offenses involving counterfeit military goods and services by amending §2B5.3 to create a new specific offense characteristic at subsection (b)(7). Subsection (b)(7) provides a 2-level enhancement and a minimum offense level of 14 if the offense involves a counterfeit military good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security. The Commission set the minimum offense level at 14 so that it would be proportionate to the minimum offense level in the enhancement for "conscious or reckless risk of death or serious bodily injury" at subsection (b)(5)(A). That enhancement is moved from (b)(5)(A) to (b)(6)(A) by the amendment.

Although section 2320(a)(3) includes offenses that are likely to cause "serious bodily injury or death," the new specific offense characteristic does not because the Commission determined that such risk of harm is adequately addressed by the existing enhancement for offenses involving the "conscious or reckless risk of death or serious bodily injury." Consistent with that

approach, the amendment includes commentary providing that the "other significant harm" specified in subsection (b)(7) does not include death or serious bodily injury and that §2B5.3(b)(6)(A) would apply if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death.

Section 2320 and Counterfeit Drugs

Second, the amendment responds to changes made by section 717 of the Food and Drug Administration Safety and Innovation Act, Pub. L. 112–144 (enacted July 9, 2012) (the "FDASIA"), which amended section 2320 to add a new subsection (a)(4) that prohibits trafficking in a counterfeit drug. A "counterfeit drug" is a drug, as defined by section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 321), that uses a counterfeit mark. *See* 18 U.S.C. § 2320(f)(6). An individual who commits an offense under subsection (a)(4) is subject to the same statutory maximum term of imprisonment as for an offense involving a counterfeit military good or service—20 years, or 30 years for a second or subsequent offense. *See* 18 U.S.C. § 2320(b)(3).

Section 717 of the FDASIA also contained a directive to the Commission to "review and amend, if appropriate" the guidelines and policy statements applicable to persons convicted of an offense described in section 2320(a)(4)—*i.e.*, offenses involving counterfeit drugs—"in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines and policy statements." *See* Pub. L. 112–144, § 717(b)(1). In addition, section 717(b)(2) provides that, in responding to the directive, the Commission shall, among other things, ensure that the guidelines reflect the serious nature of section 2320(a)(4) offenses and consider the extent to which the guidelines account for the potential and actual harm to the public resulting from such offenses.

After reviewing the legislative history of the FDASIA, public comment, testimony, and data, the Commission determined that offenses involving counterfeit drugs involve a threat to public safety and undermine the public's confidence in the drug supply chain. Furthermore, unlike many other goods covered by the infringement guideline, offenses involving counterfeit drugs circumvent a regulatory scheme established to protect the health and safety of the public. Accordingly, the amendment responds to the directive by adding a new specific offense characteristic at §2B5.3(b)(5) that provides a 2-level enhancement if the offense involves a counterfeit drug.

Offenses Resulting in Death or Serious Bodily Injury

Third, the amendment amends the Commentary to §2B5.3 to add a new upward departure consideration if the offense resulted in death or serious bodily injury. The addition of this departure consideration recognizes the distinction between an offense involving the risk of death or serious bodily injury and one in which death or serious bodily injury actually results. Departures for these reasons are already authorized in the guidelines, *see* §§5K2.1 (Death) (Policy Statement), 5K2.2 (Physical Injury) (Policy Statement), but the amendment is intended to heighten awareness of the availability of a departure in such cases.

Section 333 and Offenses Involving Intentionally Adulterated Drugs

Finally, the amendment provides a statutory reference for the new offense at 21 U.S.C. § 333(b)(7) created by section 716 of the FDASIA. Section 333(b)(7) applies to any person who knowingly and intentionally adulterates a drug such that the drug is adulterated under certain provisions of 21 U.S.C. § 351 and has a reasonable probability of causing serious adverse health consequences or death to humans or animals. It provides a statutory maximum term of imprisonment of 20 years.

The amendment amends Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). The Commission concluded that offenses under section 333(b)(7) are similar to tampering offenses under 18 U.S.C. § 1365 (Tampering with consumer products), which are referenced to §2N1.1. In addition, the public health harms that Congress intended to target in adulteration cases are similar to those targeted by violations of section 1365(a) and are best addressed under §2N1.1.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 774

AMENDMENT: The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 1 by inserting "*Tax Loss*.—" at the beginning;

in Note 2 by inserting "*Total Tax Loss Attributable to the Offense*.—" at the beginning, and by redesignating subdivisions (a) through (e) as (A) through (E);

by inserting after Note 2 the following:

"3. *Unclaimed Credits, Deductions, and Exemptions*.—In determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy (*see* §6A1.3 (Resolution of Disputed Factors) (Policy Statement)).

However, the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (*e.g.*, 'under the table' payments to employees or expenses incurred to obstruct justice).

The burden is on the defendant to establish any such credit, deduction, or exemption by a preponderance of the evidence. *See* §6A1.3, comment.";

by striking "3. 'Criminal activity' means" and inserting the following:

"4. *Application of Subsection (b)(1) (Criminal Activity)*.—'Criminal activity' means";

by striking "4. *Sophisticated Means Enhancement*.—" and inserting the following:

"5. *Application of Subsection (b)(2) (Sophisticated Means)*.—";

by striking Notes 5 and 6 as follows:

"5. A 'credit claimed against tax' is an item that reduces the amount of tax directly. In contrast, a 'deduction' is an item that reduces the amount of taxable income.

6. 'Gross income,' for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.";

and inserting the following:

"6. *Other Definitions*.—For purposes of this section:

A 'credit claimed against tax' is an item that reduces the amount of tax directly. In contrast, a 'deduction' is an item that reduces the amount of taxable income.

'Gross income' has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61."; and

in Note 7 by inserting "*Aggregation of Individual and Corporate Tax Loss*.—" at the beginning.

REASON FOR AMENDMENT: This amendment responds to a circuit conflict regarding whether a sentencing court, in calculating tax loss as defined in §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), may consider previously unclaimed credits, deductions, and exemptions that the defendant legitimately could have claimed if he or she had filed an accurate tax return.

The Tenth and Second Circuits have held that a sentencing court may give the defendant credit for a legitimate but unclaimed deduction. These circuit courts generally reason that, while a district court need not speculate about unclaimed deductions if the defendant offers weak support, nothing in the guidelines prohibits a sentencing court from considering evidence of unclaimed deductions where a defendant offers convincing proof. *See United States v. Hoskins*, 654 F.3d 1086, 1094 (10th Cir. 2011) ("[W]here defendant offers convincing proof—where the court's exercise is neither nebulous nor complex—nothing in the Guidelines prohibits a sentencing court from considering evidence of unclaimed deductions in analyzing a defendant's estimate of the tax loss suffered by the government."); *United States v. Martinez-Rios*, 143 F.3d 662, 671 (2d Cir. 1998) (holding that "the sentencing court need not base its tax loss calculation on gross unreported income if it can make a 'more accurate determination' of the intended loss and that determination of the tax loss involves giving the defendant the benefit of legitimate but unclaimed deductions"); *United States v. Gordon*, 291 F.3d 181, 187 (2d Cir. 2002) (applying *Martinez-Rios*, the court held that the district court erred when it refused to consider potential unclaimed deductions in its sentencing analysis).

Six other circuit courts—the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh—have reached the opposite conclusion, directly or indirectly holding that a court may not consider unclaimed deductions to reduce the tax loss. These circuit courts generally reason that the "object of the [defendant's] offense" is established by the amount stated on the fraudulent return, and that courts should not be required to reconstruct the defendant's return based on speculation regarding the many hypothetical ways the defendant could have completed the return. *See United States v. Delfino*, 510 F.3d 468, 473 (4th Cir. 2007) ("The law simply does not require the district court to engage in [speculation as to what deductions would have been allowed], nor does it entitle the Delfinos to the benefit of deductions they might have claimed now that they stand convicted of tax evasion."); *United States v. Phelps*, 478 F.3d 680, 682 (5th Cir. 2007) (holding that the defendant could not reduce tax loss by taking a social security tax deduction that he did not claim on the false return); *United States v. Chavin*, 316 F.3d 666, 677 (7th Cir. 2002) ("Here, the object of [the defendant]'s offense was the amount by which he underreported and fraudulently stated his tax liability on his return; reference to other unrelated mistakes on the return such as unclaimed deductions tells us nothing about the amount of loss to the government that his scheme intended to create."); *United States v. Psihos*,

683 F.3d 777, 781–82 (7th Cir. 2012) (following *Chavin* in disallowing consideration of unclaimed deductions); *United States v. Sherman*, 372 F. App'x 668, 676–77 (8th Cir. 2010); *United States v. Blevins*, 542 F.3d 1200, 1203 (8th Cir. 2008) (declining to decide "whether an unclaimed tax benefit may ever offset tax loss," but finding the district court properly declined to reduce tax loss based on taxpayers' unclaimed deductions); *United States v. Yip*, 592 F.3d 1035, 1041 (9th Cir. 2010) ("We hold that § 2T1.1 does not entitle a defendant to reduce the tax loss charged to him by the amount of potentially legitimate, but unclaimed, deductions even if those deductions are related to the offense."); *United States v. Clarke*, 562 F.3d 1158, 1165 (11th Cir. 2009) (holding that the defendant was not entitled to a tax loss calculation based on a filing status other than the one he actually used; "[t]he district court did not err in computing the tax loss based on the fraudulent return Clarke actually filed, and not on the tax return Clarke could have filed but did not.").

The amendment resolves the conflict by amending the Commentary to §2T1.1 to establish a new application note regarding the consideration of unclaimed credits, deductions, or exemptions in calculating a defendant's tax loss. This amendment reflects the Commission's view that consideration of legitimate unclaimed credits, deductions, or exemptions, subject to certain limitations and exclusions, is most consistent with existing provisions regarding the calculation of tax loss in §2T1.1. *See, e.g.*, USSG §2T1.1, comment. (n.1) ("the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts"); USSG §2T1.1, comment. (backg'd.) ("a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics"); USSG §2T1.1, comment. (n.1) (allowing a sentencing court to go beyond the presumptions set forth in the guideline if "the government or defense provides sufficient information for a more accurate assessment of the tax loss," and providing "the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed").

The new application note first provides that courts should always account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. The Commission received public comment and testimony that such deductions and exemptions are commonly considered and accepted by the government during the course of its investigation and during the course of plea negotiations. Consistent with this standard practice, the Commission determined that accounting for these generally undisputed and readily verifiable deductions and exemptions where they are not previously claimed (most commonly where the offense involves a failure to file a tax return) is appropriate.

The new application note further provides that courts should also account for any other previously unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent certain conditions are met. First, the credit, deduction, or exemption must be one that was related to the tax offense and could have been claimed at the time the tax offense was committed. This condition reflects the Commission's determination that a defendant should not be permitted to invoke unforeseen or after-the-fact changes or characterizations—such as offsetting losses that occur before or after the relevant tax year or substituting a more advantageous depreciation method or filing status—to lower the tax loss. To permit a defendant to optimize his return in this manner would unjustly reward defendants, and could require unjustifiable speculation and complexity at the sentencing hearing.

Second, the otherwise unclaimed credit, deduction, or exemption must be reasonably and practicably ascertainable. Consistent with the instruction in Application Note 1, this condition reaffirms the Commission's position that sentencing courts need only make a reasonable estimate of tax loss. In this regard, the Commission recognized that consideration of some un-

claimed credits, deductions, or exemptions could require sentencing courts to make unnecessarily complex tax determinations, and therefore concluded that limiting consideration of unclaimed credits, deductions, or exemptions to those that are reasonably and practicably ascertainable is appropriate.

Third, the defendant must present information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy. Consistent with the principles set forth in §6A1.3 (Resolution of Disputed Factors) (Policy Statement), this condition ensures that the parties have an adequate opportunity to present information relevant to the court's consideration of any unclaimed credits, deductions, or exemptions raised at sentencing.

In addition, the new application note provides that certain categories of credits, deductions, or exemptions shall not be considered by the court in any case. In particular, "the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (*e.g.*, 'under the table' payments to employees or expenses incurred to obstruct justice)." The Commission determined that payments made in this manner result in additional harm to the tax system and the legal system as a whole. Therefore, to use them to reduce the tax loss would unjustifiably benefit the defendant and would result in a tax loss figure that understates the seriousness of the offense and the culpability of the defendant.

Finally, the application note makes clear that the burden is on the defendant to establish any credit, deduction, or exemption permitted under this new application note by a preponderance of the evidence, which is also consistent with the commentary in §6A1.3.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 775

AMENDMENT: The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6 by adding at the end of the paragraph that begins "Because the Government" the following as the last sentence: "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."; and

by adding after the paragraph that begins "Because the Government" the following new paragraph:

"If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.".

The Commentary to §3E1.1 captioned "Background" Is amended In the paragraph that begins "Section 401(g)" by striking "the last paragraph" and inserting "the first sentence of the second paragraph".

REASON FOR AMENDMENT: This amendment addresses two circuit conflicts involving the guideline for acceptance of responsibility, §3E1.1 (Acceptance of Responsibility). A defendant who clearly demonstrates acceptance of responsibility for his offense receives a 2-level reduction under subsection (a) of §3E1.1. The two circuit conflicts both involve the circumstances

under which the defendant is eligible for a third level of reduction under subsection (b) of §3E1.1. Subsection (b) provides:

> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

The first circuit conflict involves the government's discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant's refusal to waive his right to appeal. The second conflict involves the court's discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

These circuit conflicts are unusual in that they involve guideline and commentary provisions that Congress directly amended. *See* section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the "PROTECT Act"); *see also* USSG App. C, Amendment 649 (effective April 30, 2003) (implementing amendments to the guidelines made directly by the PROTECT Act). They also implicate a congressional directive to the Commission not to "alter or repeal" the congressional amendments. *See* section 401(j)(4) of the PROTECT Act. Accordingly, in considering these conflicts, the Commission has not only reviewed public comment, sentencing data, case law, and the other types of information it ordinarily considers, but has also studied the operation of §3E1.1 before the PROTECT Act, the congressional action to amend §3E1.1, and the legislative history of that congressional action.

The Government's Discretion to Withold the Motion

The first circuit conflict involves the government's discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant's refusal to waive his right to appeal.

Several circuits have held that a defendant's refusal to sign an appellate waiver is a legitimate reason for the government to withhold a §3E1.1(b) motion. *See, e.g.*, *United States v. Johnson*, 581 F.3d 994, 1002 (9th Cir. 2009) (holding that "allocation and expenditure of prosecutorial resources for the purposes of defending an appeal is a rational basis" for such refusal); *United States v. Deberry*, 576 F.3d 708, 711 (7th Cir. 2009) (holding that requiring the defendant to sign an appeal waiver would avoid "expense and uncertainty" on appeal); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008) (holding that the government's interests under §3E1.1 encompass not only the government's time and effort at prejudgment stage but also at post-judgment proceedings).

In contrast, the Fourth Circuit has held that a defendant's refusal to sign an appellate waiver is not a legitimate reason for the government to withhold a §3E1.1(b) motion. *See United States v. Divens*, 650 F.3d 343, 348 (4th Cir. 2011) (stating that "the text of §3E1.1(b) reveals a concern for the efficient allocation of *trial* resources, not *appellate* resources" [emphasis in original]); *see also United States v. Davis*, 714 F.3d 474, 476 (7th Cir. 2013) (Rovner, J., concurring) ("insisting that [the defendant] waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests

identified in section 3E1.1"). The majority in *Davis* called for the conflict to be resolved, stating: "Resolution of this conflict is the province of the Supreme Court or the Sentencing Commission." *Davis*, 714 F.3d at 475 (per curiam). The Second Circuit, stating that the Fourth Circuit's reasoning in *Divens* applies "with equal force" to the defendant's request for an evidentiary hearing on sentencing issues, held that the government may not withhold a §3E1.1 motion based upon such a request. *See United States v. Lee*, 653 F.3d 170, 175 (2d Cir. 2011).

The PROTECT Act added Commentary to §3E1.1 stating that "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing." *See* §3E1.1, comment. (n.6). The PROTECT Act also amended §3E1.1(b) to provide that the government motion state, among other things, that the defendant's notification of his intention to enter a plea of guilty permitted "the government to avoid preparing for trial and . . . the government and the court to allocate their resources efficiently . . . ."

In its study of the PROTECT Act, the Commission could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. Furthermore, consistent with *Divens* and the concurrence in *Davis*, the Commission determined that the defendant's waiver of his or her right to appeal is an example of an interest not identified in §3E1.1. Accordingly, this amendment adds an additional sentence to the Commentary stating that "[t]he government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."

The Court's Discretion to Deny the Motion

The second conflict involves the court's discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

The Seventh Circuit has held that if the government makes the motion (and the other two requirements of subsection (b) are met, *i.e.*, the defendant qualifies for the 2-level decrease and the offense level is level 16 or greater), the third level of reduction must be awarded. *See United States v. Mount*, 675 F.3d 1052 (7th Cir. 2012).

In contrast, the Fifth Circuit has held that the district court retains discretion to deny the motion. *See United States v. Williamson*, 598 F.3d 227, 230 (5th Cir. 2010). In *Williamson*, the defendant was convicted after jury trial but successfully appealed. After remand, he pled guilty to a lesser offense. The government moved for the third level of reduction, but the court declined to grant it because "regardless of however much additional trial preparation the government avoided through Williamson's guilty plea following remand, the preparation for the initial trial and the use of the court's resources for that trial meant that the § 3E1.1(b) benefits to the government and the court were not obtained." *Id*. at 231. The Fifth Circuit affirmed, holding that the decision whether to grant the third level of reduction "is the district court's—not the government's—even though the court may only do so on the government's motion." *Id*. at 230.

This amendment amends the Commentary to §3E1.1 by adding the following statement: "If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion."

In its study of the PROTECT Act, the Commission could discern no congressional intent to take away from the court its responsibility under §3E1.1 to make its own determination of whether the conditions were met. In particular, both the language added to the Commentary by the PROTECT Act and the legislative history of the PROTECT Act speak in terms of allowing the court discretion to "grant" the third level of reduction. *See* USSG §3E1.1, comment. (n.6) (stating that the third level of reduction "may only be granted upon a formal motion by the Government"); H.R. Rep. No. 108–66, at 59 (2003) (Conf. Rep.) (stating that the PROTECT Act amendment would "only allow courts to grant an additional third point reduction for 'acceptance of responsibility' upon motion of the government."). In addition, the Commission observes that one of the considerations in §3E1.1(b) is whether the defendant's actions permitted the court to allocate its resources efficiently, and the court is in the best position to make that determination. Accordingly, consistent with congressional intent, this amendment recognizes that the court continues to have discretion to decide whether to grant the third level of reduction.

Finally, and as mentioned above, the Commission in its study of the PROTECT Act could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. For that reason, this amendment indicates that, if the government has filed the motion and the court also determines that the circumstances identified in §3E1.1 are present, the court should grant the motion.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 776

AMENDMENT: The Commentary to §5G1.3 captioned "Background" is amended by striking the following: "In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority,";

and inserting the following: "Federal courts generally 'have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.' *See Setser v. United States*, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, 132 S. Ct. at 1468. Exercise of that discretion,".

REASON FOR AMENDMENT: This amendment responds to a recent Supreme Court decision that federal courts have discretion to order that the sentence run consecutively to (or concurrently with) an anticipated, but not yet imposed, state sentence. *See Setser v. United States*, 132 S. Ct. 1463, 1468 (2012).

The discretion recognized in *Setser* for anticipated state sentences is similar to the discretion that federal courts have under 18 U.S.C. § 3584 for previously imposed sentences. Under section 3584, a federal court imposing a sentence generally has discretion to order that the sentence run consecutively to (or, in the alternative, concurrently with) a term of imprisonment previously imposed but not yet discharged. *See* 18 U.S.C. § 3584(a). Section 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) provides

guidance to the court in determining whether, and how, to use the discretion under section 3584, *i.e.*, whether the sentence should run consecutively to (or, in the alternative, concurrently with) the prior undischarged term of imprisonment.

The amendment amends the background commentary to §5G1.3 to include a statement that, in addition to the discretion provided by section 3584, federal courts also generally have discretion under *Setser* to order that the sentences they impose will run consecutively to or concurrently with other state sentences that are anticipated but not yet imposed. Determining whether, and how, to use this discretion will depend on the adequacy of the information available. *See Setser*, 132 S. Ct. at 1471 n.6 ("Of course, a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a district court may have inadequate information and may forbear, but in other situations, that will not be the case."). Adding this statement to the guideline that applies to the court's discretion under section 3584 is intended to provide heightened awareness of the court's similar discretion under *Setser*.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 777

AMENDMENT: The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 15 (as renumbered by Amendment 772) by striking "1a(5)" both places it appears and inserting "1a(11)"; by striking "1a(6)" both places it appears and inserting "1a(12)"; by striking "1a(20)" both places it appears and inserting "1a(28)"; and by striking "1a(23)" both places it appears and inserting "1a(31)".

Section 2B2.3(b) is amended by striking paragraph (1) as follows:

"(1) If the trespass occurred (A) at a secure government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secure area of an airport or a seaport; (E) at a residence; (F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; or (G) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.";

and inserting the following:

"(1) (Apply the greater) If—

(A) the trespass occurred (i) at a secure government facility; (ii) at a nuclear energy facility; (iii) on a vessel or aircraft of the United States; (iv) in a secure area of an airport or a seaport; (v) at a residence; (vi) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; (vii) at any restricted building or grounds; or (viii) on a computer system used (I) to maintain or operate a critical infrastructure; or (II) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels; or

(B) the trespass occurred at the White House or its grounds, or the Vice President's official residence or its grounds, increase by 4 levels.".

The Commentary to §2B2.3 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Protected computer' means" the following:

"'Restricted building or grounds' has the meaning given that term in 18 U.S.C. § 1752."; and

in Note 2 by inserting "*Application of Subsection (b)(3).*—" at the beginning.

The Notes to the Drug Quantity Table in §2D1.1(c) are amended in each of Notes (H) and (I) by striking "1308.11(d)(30)" and inserting "1308.11(d)(31)".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 2(A) by striking "Chapter Three, Part C" in the heading and inserting "§3C1.1"; and by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 2 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)"; and in Note 3 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1".

The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 2 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)".

The Commentary to §2J1.9 captioned "Application Notes" is amended in Note 1 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)"; and in Note 2 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1".

The Commentary to §4A1.1 captioned "Application Notes" is amended in each of Notes 2 and 3 by striking "court martial" and inserting "court-martial".

Section 4A1.2(g) is amended by striking "court martial" both places it appears and inserting "court-martial".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 38 the following:

"18 U.S.C. § 39A 2A5.2";

in the line referenced to 18 U.S.C. § 554 by inserting "2M5.1," after "2B1.5,";

by inserting after the line referenced to 18 U.S.C. § 1513 the following:

"18 U.S.C. § 1514(c) 2J1.2";

by inserting after the line referenced to 18 U.S.C. § 1751(e) the following:

"18 U.S.C. § 1752 2A2.4, 2B2.3"; and

by inserting after the line referenced to 19 U.S.C. § 1586(e) the following:

"19 U.S.C. § 1590(d)(1) 2T3.1

19 U.S.C. § 1590(d)(2) 2D1.1".

REASON FOR AMENDMENT: This amendment responds to recently enacted legislation and miscellaneous and technical guideline issues.

Aiming a Laser Pointer at an Aircraft

First, the amendment responds to Section 311 of the FAA Modernization and Reform Act of 2012, Pub. L. 112–95 (enacted February 14, 2012), which established a new criminal offense at 18 U.S.C. § 39A (Aiming a laser pointer at an aircraft). The offense applies to whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States or at the flight path of such an aircraft. The statutory maximum term of imprisonment is five years.

The amendment amends Appendix A (Statutory Index) to reference section 39A offenses to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle). Section 2A5.2 is the most analogous guideline because the offense involves interference with an aircraft in flight.

Restraining the Harassment of a Victim or Witness

Second, the amendment responds to section 3(a) of the Child Protection Act of 2012, Pub. L. 112–206 (enacted December 7, 2012), which established a new offense at 18 U.S.C. § 1514(c) that makes it a criminal offense to knowingly and intentionally violate or attempt to violate an order issued under section 1514 (Civil action to restrain harassment of a victim or witness). The new offense has a statutory maximum term of imprisonment of five years.

The amendment amends Appendix A (Statutory Index) to reference section 1514(c) offenses to §2J1.2 (Obstruction of Justice). Section 2J1.2 is the most analogous guideline because the offense involves interference with judicial proceedings.

Restricted Buildings and Grounds

Third, the amendment responds to the Federal Restricted Buildings and Grounds Improvement Act of 2011, Pub. L. 112–98 (enacted March 8, 2012), which amended the criminal offense at 18 U.S.C. § 1752 (Restricted building or grounds). As so amended, the statute defines "restricted buildings or grounds" to mean any restricted area (A) of the White House or its grounds, or the Vice President's official residence or its grounds; (B) of a building or grounds where the President or other person protected by the United States Secret Service is or will be temporarily visiting; or (C) of a building or grounds restricted in conjunction with an event designated as a special event of national significance. The statute makes it a crime to enter or remain; to impede or disrupt the orderly conduct of business or official functions; to obstruct or impede ingress or egress; or to engage in any physical violence against any person or property. The Act did not change the statutory maximum term of imprisonment, which is ten years if the person used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, and one year in any other case.

The amendment amends Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). These guidelines are most analogous because the elements of offenses under section 1752 involve either trespass at certain locations (*i.e.*, locations permanently or temporarily protected by the Secret Service) or interference with official business at such locations, or both.

The amendment also amends §2B2.3(b)(1) to ensure that a trespass under section 1752 provides a 4-level enhancement if the trespass occurred at the White House or the Vice President's official residence, or a 2-level enhancement if the trespass occurred at any other location permanently or temporarily protected by the Secret Service. Section 2B2.3(b)(1) provides a 2-level enhancement if the trespass occurred at locations that involve a significant federal interest, such as nuclear facilities, airports, and seaports. A trespass at a location protected by the Secret Service is no less serious than a trespass at other locations that involve a significant federal interest and warrants an equivalent enhancement of 2 levels. Section 2B2.3(b)(1) also provides a 2-level enhancement if the trespass occurred at a residence. A trespass at the residence of the President or the Vice President is more serious and poses a greater risk of harm than a trespass at an ordinary residence and warrants an enhancement of 4 levels.

Aviation Smuggling

Fourth, the amendment responds to the Ultralight Aircraft Smuggling Prevention Act of 2012, Pub. L. 112–93 (enacted February 10, 2012), which amended the criminal offense at 19 U.S.C. § 1590 (Aviation smuggling) to clarify that the term "aircraft" includes ultralight aircraft and to cover attempts and conspiracies. Section 1590 makes it unlawful for the pilot of an aircraft to transport merchandise, or for any individual on board any aircraft to possess merchandise, knowing that the merchandise will be introduced into the United States contrary to law. It is also unlawful for a person to transfer merchandise between an aircraft and a vessel on the high seas or in the customs waters of the United States unlawfully. The Act did not change the statutory maximum terms of imprisonment, which are 20 years if any of the merchandise involved was a controlled substance, *see* § 1590(d)(2), and five years otherwise, *see* § 1590(d)(1).

The amendment amends Appendix A (Statutory Index) to reference offenses under section 1590(d)(1) to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property). In such cases, §2T3.1 is the most analogous guideline because the offense involves smuggling. The amendment also amends Appendix A (Statutory Index) to reference offenses under section 1590(d)(2) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). In such cases, §2D1.1 is the most analogous guideline because controlled substances are involved in these offenses.

Interaction Between Offense Guidelines in Chapter Two, Part J, and Certain Adjustments in Chapter Three, Part C

Fifth, the amendment responds to an application issue that may arise in cases in which the defendant is sentenced under an offense guideline in Chapter Two, Part J (Offenses Involving the Administration of Justice) and the defendant may also be subject to an adjustment under Chapter Three, Part C (Obstruction and Related Adjustments). Specifically, there are application notes in four Chapter Two, Part J guidelines that, it has been argued, preclude the court from applying adjustments in Chapter Three, Part C. *See, e.g.*, *United States v. Duong*, 665 F.3d 364 (1st Cir. 2012) (observing that, "according to the literal terms" of the application notes, an adjustment under Chapter Three, Part C "'does not apply,'" but "reject[ing] that premise").

The amendment amends the relevant application notes in Chapter Two, Part J (*see* §§2J1.2, comment. (n.2(A)); 2J1.3, comment. (n.2); 2J1.6, comment. (n.2); 2J1.9, comment. (n.1)) to clarify the Commission's intent that they restrict the court from applying §3C1.1 (Obstructing or Impeding the Administration of Justice) but do not restrict the court from applying §§3C1.2, 3C1.3, and 3C1.4. These changes resolve the application issue consistent with *Duong* and promote clarity and consistency in the application of these adjustments.

Export Offenses Under 18 U.S.C. § 554

Sixth, the amendment broadens the range of guidelines to which export offenses under 18 U.S.C. § 554 (Smuggling goods from the United States) are referenced. Section 554 makes it unlawful to export or send from the United States (or attempt to do so) any merchandise, article, or object contrary to any law or regulation of the United States. It also makes it unlawful to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise, article, or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States. Offenses under section 554 have a statutory maximum term of imprisonment of ten years, and they are referenced in Appendix A (Statutory Index) to three guidelines: §§2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

The amendment amends Appendix A (Statutory Index) to add §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) to the list of guidelines to which offenses under section 554 are referenced. Not all offenses under section 554 involve munitions, cultural resources, or wildlife, so a reference to an additional guideline is warranted. For example, a section 554 offense may be based on the export of ordinary commercial goods in violation of economic sanctions or on the export of "dual-use" goods (*i.e.*, goods that have both commercial and military applications). For such cases, the additional reference to §2M5.1 promotes clarity and consistency in guideline application, and the penalty structure of §2M5.1 provides appropriate distinctions between offenses that violate national security controls and offenses that do not.

Technical and Stylistic Changes

Finally, the amendment makes certain technical and stylistic changes to the *Guidelines Manual*. First, it amends the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud) to provide updated references to the definitions contained in 7 U.S.C. § 1a, which were renumbered by Public Law 111–203 (enacted July 21, 2010). Second, it amends the Notes to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide updated references to the definition of tetrahydrocannabinols contained in 21 C.F.R. § 1308.11(d), which were renumbered by 75 Fed. Reg. 79296 (December 20, 2010). Third, it makes several stylistic revisions in the *Guidelines Manual* to change "court martial" to "court-martial." The changes are not substantive.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 778

AMENDMENT: The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 by striking "(Inadmissibility of Pleas" and inserting "Pleas".

The Commentary to §2M3.1 captioned "Application Notes" is amended in Note 1 by striking "12958" and inserting "13526".

The Commentary to §8B2.1 captioned "Background" is amended by striking "805(a)(2)(5)" and inserting "805(a)(5)".

The Commentary to §8D1.2 captioned "Application Note" is amended in Note 1 by striking "3561(b)" and inserting "3561(c)".

REASON FOR AMENDMENT: This amendment makes certain technical changes to Commentary in the *Guidelines Manual*. The changes amend—

(1) Application Note 3 to §1B1.8 (Use of Certain Information) to reflect a change to the heading of Rule 410 of the Federal Rules of Evidence;

(2) Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to ensure that the Executive Order to which it refers is the most recent Executive Order; and

(3) the Background Commentary to §8B2.1 (Effective Compliance and Ethics Program) and Application Note 1 to §8D1.2 (Term of Probation — Organizations) to correct typographical errors in citations to certain statutes.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 779

AMENDMENT: The Commentary to §1B1.11 captioned "Background" is amended in the first paragraph by striking the following:

"Although aware of possible *ex post facto* clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the *ex post facto* clause would apply to amended sentencing guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 77–78 (1983). While the Commission concurs in the policy expressed by Congress, courts to date have generally held that the *ex post facto* clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.";

and inserting the following:

"However, the Supreme Court has held that the *ex post facto* clause applies to sentencing guideline amendments that subject the defendant to increased punishment. *See Peugh v. United States*, 133 S. Ct. 2072, 2078 (2013) (holding that 'there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense').";

and

in the paragraph that begins "Subsection (b)(3)" by striking ", *cert. denied*, 493 U.S. 1062 (1990)".

REASON FOR AMENDMENT: The Commission's policy statement at §1B1.11 (Use of Guidelines in Effect on Date of Sentencing) provides that the court should apply the *Guidelines Manual* in effect on the date the defendant is sentenced unless the court determines that doing so would violate the *ex post facto* clause, in which case the court shall apply the *Guidelines Manual* in effect on the date the offense of conviction was committed. *See* §1B1.11(a), (b)(1).

Amendment 780

This amendment updates the Background Commentary to 1B1.11 to reflect the Supreme Court's decision in *Peugh v. United States*, 133 S. Ct. 2072 (2013), which held that "there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." *Id*. at 2078. The amendment inserts new language to refer to the Supreme Court's decision in *Peugh* and deletes obsolete language.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 780

AMENDMENT: Section 1B1.10 is amended in each of subsections (a)(1), (a)(2)(A), (a)(2)(B), and (b)(1) by striking "subsection (c)" each place such term appears and inserting "subsection (d)"; by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection (c):

"(c) *Cases Involving Mandatory Minimum Sentences and Substantial Assistance*.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).".

The Commentary to §1B1.10 captioned "Application Notes" is amended in Notes 1(A), 2, and 4 by striking "subsection (c)" each place such term appears and inserting "subsection (d)"; by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following new Note 4:

"4. *Application of Subsection (c)*.—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B),

Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. *See* §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.".

The Commentary to §1B1.10 captioned "Background" is amended by striking "subsection (c)" both places such term appears and inserting "subsection (d)".

Reason for Amendment: This amendment clarifies an application issue that has arisen with respect to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Circuits have conflicting interpretations of when, if at all, §1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below the statutory minimum due to substantial assistance.

This issue arises in two situations. First, there are cases in which the defendant's original guideline range was above the mandatory minimum but the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. In a sentence reduction proceeding pursuant to Amendment 750, the amended guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the "trumping" mechanism in §5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. *See* §5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eighth Circuit has taken the view that the bottom of the amended guideline range in such a case would be 240 months, *i.e.*, the guideline sentence that results after application of the "trumping" mechanism in §5G1.1. *See United States v. Golden*, 709 F.3d 1229, 1231–33 (8th Cir. 2013). In contrast, the Seventh Circuit has taken the view that the bottom of the amended guideline range in such a case would be 168 months, *i.e.*, the bottom of the amended range as determined by the Sentencing Table, without application of the "trumping" mechanism in §5G1.1. *See United States v. Wren*, 706 F.3d 861, 863 (7th Cir. 2013). Each circuit found support for its view in an Eleventh Circuit decision, *United States v. Liberse*, 688 F.3d 1198 (11th Cir. 2012), which also discussed this issue.

Second, there are cases in which the defendant's original guideline range as determined by the Sentencing Table was, at least in part, below the mandatory minimum, and the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. In these cases, the "trumping" mechanism in §5G1.1 operated at the original sentence to restrict the guideline range to be no less than the mandatory minimum. For example, consider a case in which the original Sentencing Table guideline range was 140 to 175 months but the mandatory minimum was 240 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. The defendant's original sentence was 96 months, representing a 60 percent reduction for substantial assistance below the statutory and guideline minimum. In a sentence reduction proceeding, the amended Sentencing Table guideline range is 110 to 137 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. Section 1B1.10(b)(2)(B) provides that such a defendant may receive a reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, *i.e.*, the guideline sentence that results after application of the "trumping" mechanism in §5G1.1. *See United States v. Glover*, 686 F.3d 1203, 1208 (11th Cir. 2012); *United States v. Joiner*, 727 F.3d 601 (6th Cir. 2013); *United States v. Johnson*, 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered. In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, *i.e.*, the bottom of the Sentencing Table guideline range. *See United States v. Savani*, 733 F.3d 56, 66–7 (3d Cir. 2013); *In re Sealed Case*, 722 F.3d 361, 369–70 (D.C. Cir. 2013).

The amendment generally adopts the approach of the Third Circuit in *Savani* and the District of Columbia Circuit in *In re Sealed Case*. It amends §1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of §1B1.10 the amended guideline range shall be determined without regard to the operation of §5G1.1 and §5G1.2. The amendment also adds a new application note with examples.

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance. *See* USSG App. C. Amendment 759 (Reason for Amendment). As the Commission noted in the reason for that amendment: "The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available

for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing." *Id*.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 781

AMENDMENT: Section 2A2.2(b) is amended by redesignating paragraphs (4) through (6) as paragraphs (5) through (7), respectively; and by inserting after paragraph (3) the following new paragraph (4):

"(4) If the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner, increase by 3 levels.

However, the cumulative adjustments from application of subdivisions (2), (3), and (4) shall not exceed 12 levels.".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by inserting after "113(a)(2), (3), (6)," the following: "(8),".

The Commentary to §2A2.2 captioned "Application Notes" is amended in Note 1 by striking "or (C)" and inserting "(C) strangling, suffocating, or attempting to strangle or suffocate; or (D)"; and by adding at the end the following new paragraphs:

"'Strangling' and 'suffocating' have the meaning given those terms in 18 U.S.C. § 113.

'Spouse,' 'intimate partner,' and 'dating partner' have the meaning given those terms in 18 U.S.C. § 2266.";

and in Note 4 by striking "(b)(6)" and inserting "(b)(7)".

The Commentary to §2A2.2 captioned "Background" is amended in the first paragraph by striking "minor assaults" and inserting "other assaults"; by striking the comma after "serious bodily injury" and inserting a semicolon; and by striking the comma after "cause bodily injury" and inserting "; strangling, suffocating, or attempting to strangle or suffocate;";

and in the paragraph that begins "Subsection" by striking "(b)(6)" both places it appears and inserting "(b)(7)".

Section 2A2.3 is amended in the heading by striking "Minor Assault" and inserting "Assault".

Section 2A2.3(b)(1) is amended by inserting after "substantial bodily injury to" the following: "a spouse, intimate partner, or dating partner, or".

The Commentary to §2A2.3 captioned "Statutory Provisions" is amended by inserting after "112," the following: "113(a)(4), (5), (7),".

The Commentary to §2A2.3 captioned "Application Notes" is amended in Note 1 by striking "'Minor assault' means a misdemeanor assault, or a felonious assault not covered by §2A2.2 (Aggravated Assault)." and inserting the following new paragraph:

"'Spouse,' 'intimate partner,' and 'dating partner' have the meaning given those terms in 18 U.S.C. § 2266.".

The Commentary to §2A2.3 captioned "Background" is amended by striking "Minor assault and battery are covered by this section." and inserting the following: "This section applies to misdemeanor assault and battery and to any felonious assault not covered by §2A2.2 (Aggravated Assault).".

Section 2A6.2(b)(1) is amended by striking "(C)" and inserting "(C) strangling, suffocating, or attempting to strangle or suffocate; (D)"; by striking "(D) a pattern" and inserting "(E) a pattern"; and by striking "these aggravating factors" and inserting "subdivisions (A), (B), (C), (D), or (E)".

The Commentary to §2A6.2 captioned "Application Notes" is amended in Note 1 by striking the paragraph referenced to "Stalking" as follows:

"'Stalking' means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person or an immediate family member of that person; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, that person or an immediate family member of that person. *See* 18 U.S.C. § 2261A. 'Immediate family member' (A) has the meaning given that term in 18 U.S.C. § 115(c)(2); and (B) includes a spouse or intimate partner. 'Course of conduct' and 'spouse or intimate partner' have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.",

and inserting the following new paragraph:

"'Stalking' means conduct described in 18 U.S.C. § 2261A.";

and by adding at the end of Note 1 the following new paragraph:

"'Strangling' and 'suffocating' have the meaning given those terms in 18 U.S.C. § 113.";

and in Notes 3 and 4 by striking "(b)(1)(D)" each place such term appears and inserting "(b)(1)(E)".

The Commentary to §2B1.5 captioned "Statutory Provisions" is amended by striking "1152–1153,".

The Commentary to §2B2.1 captioned "Statutory Provisions" is amended by striking "1153,".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by striking "1375a(d)(3)(C), (d)(5)(B);" and inserting "1375a(d)(5)(B)(i), (ii);".

The Commentary to §2K1.4 captioned "Statutory Provisions" is amended by striking "1153,".

The Commentary to §5D1.1 captioned "Application Notes" is amended in Note 3 by adding at the end the following:

"(D) *Domestic Violence*.—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the

legal residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.".

Appendix A (Statutory Index) is amended by striking the line referenced to 8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B) and inserting the following new line references:

"8 U.S.C. § 1375a(d)(5)(B)(i) 2H3.1

8 U.S.C. § 1375a(d)(5)(B)(ii) 2H3.1

8 U.S.C. § 1375a(d)(5)(B)(iii) 2B1.1";

in the line referenced to 18 U.S.C. § 113(a)(1) by adding ", 2A3.1" at the end;

in the line referenced to 18 U.S.C. § 113(a)(2) by adding ", 2A3.2, 2A3.3, 2A3.4" at the end;

after the line referenced to 18 U.S.C. § 113(a)(3) by inserting the following new line reference:

"18 U.S.C. § 113(a)(4) 2A2.3";

after the line referenced to 18 U.S.C. § 113(a)(7) by inserting the following new line reference:

"18 U.S.C. § 113(a)(8) 2A2.2";

by striking the lines referenced to 18 U.S.C. §§ 1152 and 1153;

by inserting after the line referenced to 18 U.S.C. § 1593A the following new line reference:

"18 U.S.C. § 1597 2X5.2"; and

by striking the lines referenced to 18 U.S.C. § 2423(a) and (b) and inserting the following new line reference:

"18 U.S.C. § 2423(a)–(d) 2G1.3".

REASON FOR AMENDMENT: This amendment responds to recent statutory changes made by the Violence Against Women Reauthorization Act of 2013 (the "Act"), Pub. L. No. 113–4 (March 7, 2013), which provided new and expanded criminal offenses and increased penalties for certain crimes pertaining to assault, sexual abuse, stalking, domestic violence, and human trafficking.

The Act established new assault offenses and enhanced existing assault offenses at 18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction). In general, section 113 sets forth a range of penalties for assaults within the special maritime and territorial jurisdiction of the United States. The legislative history of the Act indicates that Congress intended many of these changes to allow federal prosecutors to address domestic violence against Native American women more effectively. Such violence often occurs in a series of incidents of escalating seriousness.

First, the amendment responds to changes in sections 113(a)(1) and (a)(2). Section 113(a)(1) prohibits assault with intent to commit murder, and the Act amended it to also prohibit assault

with intent to commit a violation of 18 U.S.C. §§ 2241 (Aggravated sexual abuse) or 2242 (Sexual abuse), with a statutory maximum term of imprisonment of 20 years. Section 113(a)(2) prohibits assault with intent to commit any felony except murder, and prior to the Act had also excluded assault with intent to commit a violation of Chapter 109A, including sections 2241, 2242, 2243 (Sexual abuse of a minor or ward) and 2244 (Abusive sexual contact), with a statutory maximum term of imprisonment of 10 years. The Act amended section 113(a)(2) to prohibit assault with intent to commit any felony except murder or a violation of section 2241 or 2242. The effect of the statutory change is that an assault with intent to commit a violation of section 2243 or 2244 may now be prosecuted under section 113(a)(2). Offenses under section 2241 and 2242 are referenced to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), and offenses under section 2243 and 2244 are referenced to §§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts); 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).

The amendment amends Appendix A (Statutory Index) to reference the expanded offense conduct prohibited by 18 U.S.C. § 113(a)(1) to §2A3.1 and to reference the expanded offense conduct prohibited by 18 U.S.C. § 113(a)(2) to §§2A3.2, 2A3.3, and 2A3.4. The Commission concluded that an assault offense committed with the intent to commit a sexual abuse offense is analogous to, and in some cases more serious than, an attempted sexual abuse offense under Chapter 109A, and the criminal sexual abuse guidelines which apply to attempted sexual abuse offenses were therefore appropriate for this conduct.

Second, the Act increased the statutory maximum penalty for violations of 18 U.S.C. § 113(a)(4) from six months to one year of imprisonment. Section 113(a)(4) prohibits an assault by striking, beating, or wounding. Because the crime had been categorized as a Class B misdemeanor, Appendix A did not previously include a reference for section 113(a)(4). The amendment adds such a reference to §2A2.3 (Assault). The Commission determined that §2A2.3 will provide appropriate punishment that is consistent with the statutory maximum term of imprisonment, while sufficiently addressing the possible levels of bodily harm that may result to victims in individual cases of assault by striking, beating, or wounding.

Third, the Act expanded 18 U.S.C. § 113(a)(7), which prohibits assaults resulting in substantial bodily injury to an individual who has not attained the age of sixteen years, to also apply to assaults resulting in substantial bodily injury to a spouse, intimate partner, or dating partner, and provides a statutory maximum term of imprisonment of five years. Offenses under section 113(a)(7) are referenced in Appendix A to §2A2.3 (Assault). The amendment broadened the scope of §2A2.3(b)(1)(B), which provides a 4-level enhancement if the offense resulted in substantial bodily injury to an individual under the age of sixteen years, to also provide a 4-level enhancement if the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner. The Commission determined that because the expanded assaultive conduct of a victim of domestic violence has the same statutory maximum term of imprisonment, the same enhancement was warranted as for assaults of individuals under the age of sixteen resulting in substantial bodily injury.

Fourth, the Act created a new section 113(a)(8) in title 18, which prohibits the assault of a spouse, intimate partner, or dating partner by strangulation, suffocation, or attempting to strangle or suffocate, with a statutory maximum term of imprisonment of ten years. After reviewing legislative history, public comment, testimony at a public hearing on February 13, 2014, and data, the Commission determined that strangulation and suffocation of a spouse, intimate partner, or dating partner represents a significant harm not addressed by existing guidelines and specific offense characteristics.

Comment and testimony that the Commission received indicated that strangulation and suffocation in the domestic violence context is serious conduct that warrants enhanced punishment regardless of whether it results in a provable injury that would lead to a bodily injury enhancement; this conduct harms victims physically and psychologically and can be a predictor of future serious or lethal violence. Testimony and data also indicated that cases of strangulation and suffocation often involve other bodily injury to a victim separate from the strangulation and suffocation. Congress specifically addressed strangulation and suffocation in the domestic violence context, and testimony and data indicated that almost all cases involving this conduct occur in that context and that strangulation and suffocation is most harmful in such cases.

Accordingly, the amendment amends Appendix A to reference section 113(a)(8) to §2A2.2 (Aggravated Assault) and amends the Commentary to §2A2.2 to provide that the term "aggravated assault" includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. The amendment amends §2A2.2 to provide a 3-level enhancement at §2A2.2(b)(4) for strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner. The amendment also provides that the cumulative impact of the enhancement for use of a weapon at §2A2.2(b)(2), bodily injury at §2A2.2(b)(3), and strangulation or suffocation at §2A2.2(b)(4) is capped at 12 levels. The Commission determined that the cap would assure that these three specific offense characteristics, which data suggests co-occur frequently, will enhance the ultimate sentence without leading to an excessively severe result.

Although the amendment refers section 113(a)(8) offenses to §2A2.2, it also amends §2A6.2 (Stalking or Domestic Violence) to address cases involving strangulation, suffocation, or attempting to strangle or suffocate, as a conforming change. The amendment adds strangulation and suffocation as a new aggravating factor at §2A6.2(b)(1), which results in a 2-level enhancement, or in a 4-level enhancement if it applies in conjunction with another aggravating factor such as bodily injury or the use of a weapon.

Fifth, the amendment removes the term "minor assault" from the *Guidelines Manual*. Misdemeanor assaults and other felonious assaults are referenced to §2A2.3, which prior to this amendment was titled "Minor Assault." Informed by public comment, the Commission determined that use of the term "minor" is inconsistent with the severity of the underlying crimes and does a disservice to the victims and communities affected. Therefore, the amendment changes the title of §2A2.3 to "Assault," and it removes other references to "minor assault" from the Background and Commentary sections of §§2A2.2 and 2A2.3. This is a stylistic change that does not affect the application of §2A2.3.

Sixth, the amendment amended the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) to provide additional guidance on the imposition of supervised release for domestic violence and stalking offenders. The amendment describes the statutory requirements pursuant to 18 U.S.C. § 3583(a) if a defendant is convicted for the first time of a domestic violence offense as defined in 18 U.S.C. § 3561(b). Under section 3583, a term of supervised release is required, and the defendant is also required to attend an approved rehabilitation program if one is available within a 50-mile radius from the defendant's residence.

The Commission received public comment and testimony that supervised release should be recommended in every case of domestic violence and stalking, and the Commission's sentencing data showed that in more than ninety percent of the cases sentenced under §2A6.2, supervised release was imposed. Based on this comment, testimony, and data, the amendment amends the Commentary to §5D1.1 to provide that in any other case involving either a domestic violence or a stalking offense, it is "highly recommended" that a term of supervised release be imposed.

Seventh, the amendment responds to changes made by the Act amending the federal statutes related to stalking and domestic violence. For the crimes of interstate domestic violence (18 U.S.C. § 2261), stalking (18 U.S.C. § 2261A), and interstate violation of a protective order (18 U.S.C. § 2262), the Act expanded the scope of each offense to provide that a defendant's mere presence in a special maritime or territorial jurisdiction is sufficient for purposes of satisfying the jurisdictional element of the crimes. The Act also revised the prohibited conduct set forth in section 2261A to now include stalking with intent to "intimidate" the victim, and it added the use of an "electronic communication service" or "electronic communication system" as prohibited means of committing the crime.

The amendment updates the definition of "stalking" in §2A6.2 to reflect these changes by tying the definition to the conduct described in 18 U.S.C. § 2261A. The Commission determined that such a change would simplify the application of §2A6.2, while also ensuring that the definition of stalking remains consistent with any future statutory changes.

Eighth, the Act amended 8 U.S.C. § 1375a (Regulation of international marriage brokers) by reorganizing existing offenses and increasing the statutory maximum term of imprisonment for knowing violations of the regulations concerning marriage brokers from one year to five years. The Act also added a new criminal provision for "knowingly and with intent to defraud another person outside of the United States in order to recruit, solicit, entice, or induce that person into entering a dating or matrimonial relationship," making false or fraudulent representations regarding the background information required to be provided to an international marriage brokers. The new offense has a statutory maximum term of imprisonment of one year. The amendment referenced this new offense in Appendix A to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission concluded that §2B1.1 is the appropriate guideline because the elements of the new offense include fraud and deceit. The amendment also amended Appendix A by revising the other criminal subsections, which continue to be referred to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information), to accord with the reorganization of the statute.

Ninth, the Trafficking Victims Protection Reauthorization Act, passed as part of the Act, included a provision expanding subsection (c) of 18 U.S.C. § 2423 (Transportation of minors), which had previously prohibited U.S. citizens or permanent residents who traveled abroad from engaging in illicit sexual conduct. After the Act, the same prohibition now also applies to those individuals who reside temporarily or permanently in a foreign country and engage in such conduct. Section 2423 contains four offenses, set forth in subsections (a) through (d), each of which prohibits sexual conduct with minors. Prior to the amendment, Appendix A referenced sections 2423(a) and 2423(b) to §2G1.3 (Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors; Travel to Engage in Commercial Sex or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children), but provided no reference for sections 2423(c) or 2423(d), which prohibits arranging, inducing, procuring, or facilitating the travel of a person for illicit sexual conduct, for the purpose of commercial advantage or financial gain. Both subsections (c) and (d) provide a 30 year statutory maximum term of imprisonment.

The amendment adds references in Appendix A for 18 U.S.C. §§ 2423(c) and (d). Based on the seriousness of the prohibited conduct, the severity of the penalties, and the vulnerability of the victims involved, the Commission concluded that 18 U.S.C. §§ 2423(c) and (d) should also be referenced in Appendix A to §2G1.3.

Tenth, the Act created a new Class A misdemeanor offense at 18 U.S.C. § 1597 prohibiting the knowing destruction, concealment, confiscation or possession of an actual or purported passport or other immigration documents of another individual if done in the course of violating or with the intent to violate 18 U.S.C. § 1351, relating to fraud in foreign labor contracting, or 8 U.S.C. § 1324, relating to bringing in or harboring certain aliens. The new offense also prohibits this conduct if it is done in order to, without lawful authority, maintain, prevent, or restrict the labor or services of the individual, and the knowing obstruction, attempt to obstruct, or interference with or prevention of the enforcement of section 1597. Section 1597 has a statutory maximum term of imprisonment of one year.

The amendment references this misdemeanor offense to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). This reference comports with the Commission's intent when it promulgated §2X5.2, as stated in Amendment 685 (effective November 1, 2006), that the Commission will reference new Class A misdemeanor offenses either to §2X5.2 or to another, more specific Chapter Two guideline, if appropriate. The Commission determined that with a base offense level of 6, §2X5.2 covers the range of sentencing possibilities that are available for defendants convicted of this offense, regardless of their criminal history. The Commission may consider referencing section 1597 to another substantive guideline in the future after more information becomes available regarding the type of conduct that constitutes the typical violation and the aggravating or mitigating factors that may apply.

Finally, the amendment removes from Appendix A the guideline references for two jurisdictional statutes in title 18 related to crimes committed within Indian country. Section 1152, also known as the General Crimes Act, grants federal jurisdiction for federal offenses committed by non-Indians within Indian country. Section 1153, also known as the Major Crimes Act, grants federal jurisdiction over Indians who commit certain enumerated offenses within Indian country. The Act expanded section 1153 to include any felony assault under section 113. Because sections 1152 and 1153 are simply jurisdictional statutes that do not provide substantive offenses, the Commission determined there is no need for Appendix A to provide a guidelines reference for those statutes.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 782

AMENDMENT: Section 2D1.1(c) is amended by striking paragraph (17); by redesignating paragraphs (1) through (16) as paragraphs (2) through (17), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1) ● 90 KG or more of Heroin; Level 38
● 450 KG or more of Cocaine;
● 25.2 KG or more of Cocaine Base;
● 90 KG or more of PCP, or 9 KG or more of PCP (actual);
● 45 KG or more of Methamphetamine, or
4.5 KG or more of Methamphetamine (actual), or
4.5 KG or more of 'Ice';
● 45 KG or more of Amphetamine, or
4.5 KG or more of Amphetamine (actual);
● 900 G or more of LSD;
● 36 KG or more of Fentanyl;
● 9 KG or more of a Fentanyl Analogue;
● 90,000 KG or more of Marihuana;

- 18,000 KG or more of Hashish;
- 1,800 KG or more of Hashish Oil;
- 90,000,000 units or more of Ketamine;
- 90,000,000 units or more of Schedule I or II Depressants;
- 5,625,000 units or more of Flunitrazepam.".

Section 2D1.1(c)(2) (as so redesignated) is amended to read as follows:

"(2)
- At least 30 KG but less than 90 KG of Heroin; Level 36
- At least 150 KG but less than 450 KG of Cocaine;
- At least 8.4 KG but less than 25.2 KG of Cocaine Base;
- At least 30 KG but less than 90 KG of PCP, or
  at least 3 KG but less than 9 KG of PCP (actual);
- At least 15 KG but less than 45 KG of Methamphetamine, or
  at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or
  at least 1.5 KG but less than 4.5 KG of 'Ice';
- At least 15 KG but less than 45 KG of Amphetamine, or
  at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
- At least 300 G but less than 900 G of LSD;
- At least 12 KG but less than 36 KG of Fentanyl;
- At least 3 KG but less than 9 KG of a Fentanyl Analogue;
- At least 30,000 KG but less than 90,000 KG of Marihuana;
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of
  Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.".

Section 2D1.1(c)(3) (as so redesignated) is amended by striking "Level 36" and inserting "Level 34".

Section 2D1.1(c)(4) (as so redesignated) is amended by striking "Level 34" and inserting "Level 32".

Section 2D1.1(c)(5) (as so redesignated) is amended by striking "Level 32" and inserting "Level 30"; and by inserting before the line referenced to Flunitrazepam the following:

"
- 1,000,000 units or more of Schedule III Hydrocodone;".

Section 2D1.1(c)(6) (as so redesignated) is amended by striking "Level 30" and inserting "Level 28"; and in the line referenced to Schedule III Hydrocode by striking "700,000 or more" and inserting "At least 700,000 but less than 1,000,000".

Section 2D1.1(c)(7) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26".

Section 2D1.1(c)(8) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.1(c)(9) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.1(c)(10) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20"; and by inserting before the line referenced to Flunitrazepam the following:

" ● 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);".

Section 2D1.1(c)(11) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18"; and in the line referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking "40,000 or more" and inserting "At least 40,000 but less than 60,000".

Section 2D1.1(c)(12) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.1(c)(13) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.1(c)(14) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue and inserting the following:

"(14) ● Less than 10 G of Heroin; Level 12
● Less than 50 G of Cocaine;
● Less than 2.8 G of Cocaine Base;
● Less than 10 G of PCP, or
less than 1 G of PCP (actual);
● Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual),
or less than 500 MG of 'Ice';
● Less than 5 G of Amphetamine, or
less than 500 MG of Amphetamine (actual);
● Less than 100 MG of LSD;
● Less than 4 G of Fentanyl;
● Less than 1 G of a Fentanyl Analogue;";

by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● 80,000 units or more of Schedule IV substances (except Flunitrazepam).".

Section 2D1.1(c)(15) (as so redesignated) is amended by striking "Level 12" and inserting "Level 10"; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue; and in the line referenced to Schedule IV substances (except Flunitrazepam) by striking "40,000 or more" and inserting "At least 40,000 but less than 80,000".

Section 2D1.1(c)(16) (as so redesignated) is amended by striking "Level 10" and inserting "Level 8"; in the line referenced to Flunitrazepam by striking "At least 62 but less" and inserting "Less"; by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

" ● 160,000 units or more of Schedule V substances.".

Section 2D1.1(c)(17) (as so redesignated) is amended to read as follows:

"(17) ● Less than 1 KG of Marihuana; Level 6
● Less than 200 G of Hashish;
● Less than 20 G of Hashish Oil;
● Less than 1,000 units of Ketamine;
● Less than 1,000 units of Schedule I or II Depressants;
● Less than 1,000 units of Schedule III Hydrocodone;
● Less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
● Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
● Less than 160,000 units of Schedule V substances.".

The annotation to §2D1.1(c) captioned "Notes to Drug Quantity Table" is amended in Note (E) by striking "100 G" and inserting "100 grams"; in Note (F) by striking "0.5 ml" and "25 mg" and inserting "0.5 milliliters" and "25 milligrams", respectively; and in Note (G) by striking "0.4 mg" and inserting "0.4 milligrams".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8(A) by striking "1 gm", "5 kg", "100 gm", and "500 kg" and inserting "1 gram", "5 kilograms", "100 grams", and "500 kilograms", respectively, and by striking "28" and inserting "26";

in Note 8(B) by striking "999 grams" and inserting "2.49 kilograms";

in Note 8(C)(i) by striking "22" and inserting "20", by striking "18" and inserting "16", and by striking "24" and inserting "22";

in Note 8(C)(ii) by striking "8" both places such term appears and inserting "6", by striking "five kilograms" and inserting "10,000 units", and by striking "10" and inserting "8";

in Note 8(C)(iii) by striking "16" and inserting "14", by striking "14" and inserting "12", and by striking "18" and inserting "16";

in Note 8(C)(iv) by striking "56,000" and inserting "76,000", by striking "100,000" and inserting "200,000", by striking "200,000" and inserting "600,000", by striking "56" and inserting "76", by striking "59.99" and inserting "79.99", by striking "4.99" and inserting "9.99", by striking "6.25" and inserting "12.5", by striking "999 grams" and inserting "2.49 kilograms", by striking "1.25" and inserting "3.75", by striking "59.99" and inserting "79.99", and by striking "61.99 (56 + 4.99 + .999)" and inserting "88.48 (76 + 9.99 + 2.49)";

in Note 8(D), under the heading relating to Schedule III Substances (except ketamine and hydrocodone), by striking "59.99" and inserting "79.99"; under the heading relating to Schedule III Hydrocodone, by striking "999.99" and inserting "2,999.99"; under the heading relating to Schedule IV Substances (except flunitrazepam) by striking "4.99" and inserting "9.99"; and under the heading relating to Schedule V Substances by striking "999 grams" and inserting "2.49 kilograms";

and in Note 9 by striking "500 mg" and "50 gms" and inserting "500 milligrams" and "50 grams", respectively.

The Commentary to §2D1.1 captioned "Background" is amended in the paragraph that begins "The base offense levels in §2D1.1" by striking "32 and 26" and inserting "30 and 24"; and by striking the paragraph that begins "The base offense levels at levels 26 and 32" as follows:

" The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; *e.g.*, level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.",

and inserting the following new paragraph:

" The base offense levels at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; *e.g.*, level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.".

The Commentary to §2D1.2 captioned "Application Note" is amended in Note 1 by striking "16" and inserting "14"; and by striking "17" and inserting "15".

Section 2D1.11(d) is amended by striking paragraph (14); by redesignating paragraphs (1) through (13) as paragraphs (2) through (14), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1)	9 KG or more of Ephedrine; 9 KG or more of Phenylpropanolamine; 9 KG or more of Pseudoephedrine.".	Level 38

Section 2D1.11(d)(2) (as so redesignated) is amended by striking "Level 38" and inserting "Level 36"; and by striking "3 KG or more" each place such term appears and inserting "At least 3 KG but less than 9 KG".

Section 2D1.11(d)(3) (as so redesignated) is amended by striking "Level 36" and inserting "Level 34".

Section 2D1.11(d)(4) (as so redesignated) is amended by striking "Level 34" and inserting "Level 32".

Section 2D1.11(d)(5) (as so redesignated) is amended by striking "Level 32" and inserting "Level 30".

Section 2D1.11(d)(6) (as so redesignated) is amended by striking "Level 30" and inserting "Level 28".

Section 2D1.11(d)(7) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26".

Section 2D1.11(d)(8) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.11(d)(9) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.11(d)(10) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20".

Section 2D1.11(d)(11) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18".

Section 2D1.11(d)(12) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.11(d)(13) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.11(d)(14) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; and by striking "At least 500 MG but less" each place such term appears and inserting "Less".

Section 2D1.11(e) is amended by striking paragraph (10); by redesignating paragraphs (1) through (9) as paragraphs (2) through (10), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1) *List I Chemicals* Level 30
2.7 KG or more of Benzaldehyde;
60 KG or more of Benzyl Cyanide;
600 G or more of Ergonovine;
1.2 KG or more of Ergotamine;
60 KG or more of Ethylamine;
6.6 KG or more of Hydriodic Acid;
3.9 KG or more of Iodine;
960 KG or more of Isosafrole;
600 G or more of Methylamine;
1500 KG or more of N-Methylephedrine;
1500 KG or more of N-Methylpseudoephedrine;
1.9 KG or more of Nitroethane;
30 KG or more of Norpseudoephedrine;
60 KG or more of Phenylacetic Acid;
30 KG or more of Piperidine;
960 KG or more of Piperonal;
4.8 KG or more of Propionic Anhydride;
960 KG or more of Safrole;
1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;
3406.5 L or more of Gamma-butyrolactone;
2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.".

Section 2D1.11(e)(2) (as so redesignated) is amended to read as follows:

"(2) *List I Chemicals* Level 28
At least 890 G but less than 2.7 KG of Benzaldehyde;
At least 20 KG but less than 60 KG of Benzyl Cyanide;
At least 200 G but less than 600 G of Ergonovine;
At least 400 G but less than 1.2 KG of Ergotamine;
At least 20 KG but less than 60 KG of Ethylamine;
At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;
At least 1.3 KG but less than 3.9 KG of Iodine;
At least 320 KG but less than 960 KG of Isosafrole;
At least 200 G but less than 600 G of Methylamine;
At least 500 KG but less than 1500 KG of N-Methylephedrine;
At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;
At least 625 G but less than 1.9 KG of Nitroethane;
At least 10 KG but less than 30 KG of Norpseudoephedrine;
At least 20 KG but less than 60 KG of Phenylacetic Acid;
At least 10 KG but less than 30 KG of Piperidine;
At least 320 KG but less than 960 KG of Piperonal;

At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;
At least 320 KG but less than 960 KG of Safrole;
At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;
At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

List II Chemicals
33 KG or more of Acetic Anhydride;
3525 KG or more of Acetone;
60 KG or more of Benzyl Chloride;
3225 KG or more of Ethyl Ether;
3600 KG or more of Methyl Ethyl Ketone;
30 KG or more of Potassium Permanganate;
3900 KG or more of Toluene.".

Section 2D1.11(e)(3) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26"; and, under the heading relating to List II Chemicals, by striking the line referenced to Acetic Anhydride and all that follows through the line referenced to Toluene and inserting the following:

" At least 11 KG but less than 33 KG of Acetic Anhydride;
At least 1175 KG but less than 3525 KG of Acetone;
At least 20 KG but less than 60 KG of Benzyl Chloride;
At least 1075 KG but less than 3225 KG of Ethyl Ether;
At least 1200 KG but less than 3600 KG of Methyl Ethyl Ketone;
At least 10 KG but less than 30 KG of Potassium Permanganate;
At least 1300 KG but less than 3900 KG of Toluene.".

Section 2D1.11(e)(4) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.11(e)(5) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.11(e)(6) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20".

Section 2D1.11(e)(7) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18".

Section 2D1.11(e)(8) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.11(e)(9) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.11(e)(10) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; and in each line by striking "At least" and all that follows through "but less" and inserting "Less".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 1(A) by striking "38" both places such term appears and inserting "36", and by striking "26" and inserting "24"; and in Note 1(B) by striking "32" and inserting "30".

The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(B) by striking "14" and inserting "12".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in Example 2 by striking "26" and inserting "24"; and by striking "28" each place such term appears and inserting "26".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 2(D) by striking "40" and inserting "90"; by striking "15" and inserting "25"; and by striking "55" and inserting "115".

REASON FOR AMENDMENT: This amendment revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) incorporate the statutory mandatory minimum penalties for such offenses.

When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing ranges for all drug quantities, *see* §2D1.1, comment. (backg'd.), with a minimum base offense level of 6 and a maximum base offense level of 38 for most drug types.

This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. *See* 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code"); *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").

Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold

quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.

The amendment also makes parallel changes to the quantity tables in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), which apply to offenses involving chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product.

In considering this amendment, the Commission held a hearing on March 13, 2014, and heard expert testimony from the Executive Branch, including the Attorney General and the Director of the Federal Bureau of Prisons, defense practitioners, state and local law enforcement, and interested community representatives. The Commission also received substantial written public comment, including from the Federal judiciary, members of Congress, academicians, community organizations, law enforcement groups, and individual members of the public.

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve its stated purpose. Previously, the Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels [levels 26 and 32] to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." However, changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.

In 1994, after the initial selection of levels 26 and 32, Congress enacted the "safety valve" provision, which applies to certain non-violent drug defendants and allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." *See* 18 U.S.C. § 3553(f). The guidelines incorporate the "safety valve" at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and, furthermore, provide a 2-level reduction if the defendant meets the "safety valve" criteria. *See* §2D1.1(b)(16).

These statutory and guideline provisions, which are unrelated to the guideline range's relationship to the mandatory minimum, provide adequate incentive to plead guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the "safety valve" than if they do not. In fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for the "safety valve" and a plea rate of 93.9 percent if they did not.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. Similar to this amendment, the Commission in 2007 amended the Drug Quantity Table for cocaine base ("crack" cocaine) so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32. *See* USSG App. C, Amendment 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively. For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under §5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect. This recent experience indicates that this amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to plead guilty or otherwise cooperate with authorities. *See* 28 U.S.C. § 991(b) (specifying that sentencing policies are to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

The amendment also reflects the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times—often in response to congressional directives—to provide a greater emphasis on the defendant's conduct and role in the offense rather than on drug quantity. The version of §2D1.1 in the original 1987 *Guidelines Manual* contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 in effect at the time of this amendment contains fourteen enhancements and three downward adjustments (including the "mitigating role cap" provided in subsection (a)(5)). These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

The amendment was also motived by the significant overcapacity and costs of the Federal Bureau of Prisons. The Sentencing Reform Act directs the Commission to ensure that the sentencing guidelines are "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." *See* 28 U.S.C. § 994(g). Reducing the federal prison population and the costs of incarceration has become an urgent consideration. The Commission observed that the federal prisons are now 32 percent overcapacity, and drug trafficking offenders account for approximately 50 percent of the federal prison population (100,114 of 199,810 inmates as of October 26, 2013, for whom the Commission could determine the offense of conviction). Spending on federal prisons exceeds $6 billion a year, or more than 25 percent of the entire budget for the Department of Justice. The Commission received testimony from the Department of Justice and others that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs, all of which promote public safety.

In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons. Based on an analysis of the 24,968 offenders sentenced under §2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457—or 69.9 percent—of drug trafficking offenders sentenced under §2D1.1, and their average sentence will be reduced by 11 months—or 17.7 percent—from 62 months to 51 months. The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety. In particular, the Commission was informed by its studies that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. *See* USSG App. C, Amendment 713 (effective March 3, 2008). The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.

Furthermore, existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for drug trafficking offenders with small quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received testimony from several stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 783

AMENDMENT: Section 2D1.1(b) is amended by redesignating paragraphs (14) through (16) as paragraphs (15) through (17), respectively; and by inserting after paragraph (13) the following new paragraph (14):

"(14) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 16 by striking "(b)(14)(D)" and inserting "(b)(15)(D)"; by redesignating Notes 19 through 26 as Notes 20 through 27, respectively; and by inserting after Note 18 the following new Note 19:

"19. *Application of Subsection (b)(14).*—Subsection (b)(14) applies to offenses that involve the cultivation of marihuana on state or federal land or while trespassing on tribal or private land. Such offenses interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment.

The enhancements in subsection (b)(13)(A) and (b)(14) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. *See* §1B1.1 (Application Instructions), Application Note 4(A).";

in the heading of Note 20 (as so redesignated) by striking "(b)(14)" and inserting "(b)(15)";

in Note 20(A) (as so redesignated) by striking "(b)(14)(B)" both places such term appears and inserting "(b)(15)(B)";

in Note 20(B) (as so redesignated) by striking "(b)(14)(C)" each place such term appears and inserting "(b)(15)(C)";

in Note 20(C) (as so redesignated) by striking "(b)(14)(E)" both places such term appears and inserting "(b)(15)(E)"; and

in Note 21 (as so redesignated) by striking "(b)(16)" each place such term appears and inserting "(b)(17)".

The Commentary to §2D1.1 captioned "Background" is amended by striking "(b)(14)" and inserting "(b)(15)"; and by striking "(b)(15)" and inserting "(b)(16)".

Section 2D1.14(a)(1) is amended by striking "(b)(16)" and inserting "(b)(17)".

The Commentary to §3B1.4 captioned "Application Notes" is amended in Note 2 by striking "(b)(14)(B)" and inserting "(b)(15)(B)".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 7 by striking "(b)(14)(D)" and inserting "(b)(15)(D)".

Reason for Amendment: This amendment provides increased punishment for certain defendants involved in marihuana cultivation operations on state or federal land or while trespassing on tribal or private land. The amendment adds a new specific offense characteristic at subsection (b)(14) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The new specific offense characteristic provides an increase of two levels if the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land.

The amendment responds to concerns raised by federal and local elected officials, law enforcement groups, trade groups, environmental advocacy groups and others, especially in areas of the country where unlawful outdoor marihuana cultivation is occurring with increasing frequency. The concerns included the fact that such operations typically involve acts such as clearing existing vegetation, diverting natural water sources for irrigation, using potentially harmful chemicals, killing wild animals, and leaving trash and debris at the site. The concerns also included the risk to public safety of marihuana cultivation operations on federal or state land or while trespassing on tribal or private land. Additionally, when an operation is located on public land or on private land without the owner's permission, the operation deprives the public or the owner of lawful access to and use of the land.

Accordingly, this amendment provides an increase of two levels when a marihuana cultivation operation is located on state or federal land or while trespassing on tribal or private land, but only applies to defendants who received an adjustment under §3B1.1 (Aggravating Role). These defendants are more culpable and have greater decision-making authority in the operation. The amendment also adds commentary in §2D1.1 at Application Note 19 clarifying that,

consistent with ordinary guideline operation, the new increase may be applied cumulatively with the existing enhancement at subsection (b)(13)(A) of §2D1.1, which applies if an offense involved certain conduct relating to hazardous or toxic substances or waste.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 784

AMENDMENT: Section 2K2.1(c)(1) is amended by inserting after "firearm or ammunition" both places it appears the following: "cited in the offense of conviction".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 14 by striking "*'In Connection With'.*—" and inserting "*Application of Subsections (b)(6)(B) and (c)(1).*—";

in Note 14(A) by adding at the end the following: "However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.";

in Note 14(B) by striking "application of subsections (b)(6)(B) and (c)(1)" and inserting "application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1)";

and by adding at the end of Note 14 the following:

"(E) *Relationship Between the Instant Offense and the Other Offense*.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) *Firearm Cited in the Offense of Conviction*. Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be 'part of the same course of conduct or common scheme or plan' as the unlawful possession of the same shotgun on October 15. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 9 to §1B1.3). The use of the shotgun 'in connection with' the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). *See* §1B1.3(a)(4) ('any other information specified in the applicable guideline').

(ii) *Firearm Not Cited in the Offense of Conviction*. Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed

a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were 'part of the same course of conduct or common scheme or plan'. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 9 to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun 'in connection with' the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). *See* §1B1.3(a)(4) ('any other information specified in the applicable guideline'). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not 'part of the same course of conduct or common scheme or plan,' then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.".

REASON FOR AMENDMENT: This amendment addresses cases in which the defendant is convicted of a firearms offense (in particular, being a felon in possession of a firearm) and also possessed a firearm in connection with another offense, such as robbery or attempted murder.

In such a case, the defendant is sentenced under the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). If the defendant possessed any firearm in connection with another felony offense, subsection (b)(6)(B) provides a 4-level enhancement and a minimum offense level of 18. If the defendant possessed any firearm in connection with another offense, subsection (c)(1) provides a cross reference to the offense guideline applicable to the other offense, if it results in a higher offense level. (For example, if the defendant possessed any firearm in connection with a robbery, a cross reference to the robbery guideline may apply.)

This amendment is a result of the Commission's review of the operation of subsections (b)(6)(B) and (c)(1). The review was prompted in part because circuits have been following a range of approaches in determining whether these provisions apply. Several circuits have taken the view that subsections (b)(6)(B) and (c)(1) apply only if the other offense is a "groupable" offense under §3D1.2(d). *See, e.g.*, *United States v. Horton*, 693 F.3d 463, 478–79 (4th Cir. 2012) (felon in possession used a firearm in connection with a murder, but the cross reference does not apply because murder is not "groupable"); *United States v. Settle*, 414 F.3d 629, 632–33 (6th Cir. 2005) (attempted murder); *United States v. Jones*, 313 F.3d 1019, 1023 n.3 (7th Cir. 2002) (murder); *United States v. Williams*, 431 F.3d 767, 772–73 & n.9 (11th Cir. 2005) (aggravated assault). *But see United States v. Kulick*, 629 F.3d 165, 170 (3d Cir. 2010) (felon in possession used a firearm in connection with extortion; the cross reference may apply even though extortion is not "groupable"); *United States v. Gonzales*, 996 F.2d 88, 92 n.6 (5th Cir. 1993) (relevant conduct principles do not restrict the application of subsection (b)(6)(B)); *United States v. Outley*, 348 F.3d 476 (5th Cir. 2003) (relevant conduct principles do not restrict the application of subsection (c)(1)).

The amendment clarifies how relevant conduct principles operate in determining whether subsections (b)(6)(B) and (c)(1) apply. Subsections (b)(6)(B) and (c)(1) are not intended to apply only when the other felony offense is a "groupable" offense. Such an approach would result in unwarranted disparities, with defendants who possess a firearm in connection with a "groupable" offense (such as a drug offense) being subject to higher penalties than defendants who possess a firearm in connection with a "non-groupable" offense (such as murder or robbery). Instead, the central question for the court in these cases is whether the defendant's two firearms offenses—the firearms offense of conviction, and his unlawful possession of a firearm in connection with the other felony offense—were "part of the same course of conduct or common scheme or plan." *See* §1B1.3(a)(2). The amendment adds examples to the commentary to clarify how relevant conduct principles are intended to operate in this context.

The amendment also responds to concerns regarding the impact of subsection (c)(1), particularly in cases in which the defendant was convicted of unlawfully possessing a firearm on one occasion but was found to have possessed a different firearm on another occasion in connection with another, more serious, offense. Because unlawfully possessing a firearm is an offense based on a status (*i.e.*, being a felon) that can continue for many years, the cross reference at subsection (c)(1) may, in effect, expose such a defendant to the highest offense level of any crime he may have committed at any time, regardless of its connection to the instant offense.

While relevant conduct principles provide a limitation on the scope of subsection (c)(1) (and, as discussed above, this amendment clarifies how those principles operate in this context), the Commission determined that a further limitation on the scope of subsection (c)(1) is appropriate. Specifically, the instant offense and the other offense must be related to each other by, at a minimum, having an identifiable firearm in common. Accordingly, the amendment revises the cross reference so that it applies only to the particular firearm or firearms cited in the offense of conviction.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 785

AMENDMENT: The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 5 after "vehicle" by striking the comma and inserting a semicolon; after "vessel" by striking ", or" and inserting a semicolon; and after "inhumane condition" by inserting the following: "; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements".

REASON FOR AMENDMENT: This amendment accounts for the risks of death, injury, starvation, dehydration, or exposure that aliens potentially face when transported through dangerous and remote geographical areas, *e.g.*, along the southern border of the United States.

Section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) currently has an enhancement at subsection (b)(6), which provides for a 2-level increase and a minimum offense level of 18, for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. The Commentary for subsection (b)(6), Application Note 5, explains that §2L1.1(b)(6) may apply to a "wide variety of conduct" and provides as examples "transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition."

One case that illustrates the concerns addressed in this amendment is *United States v. Mateo Garza*, 541 F.3d 290 (5th Cir. 2008), in which the Fifth Circuit held that the reckless endangerment enhancement at §2L1.1(b)(6) does not *per se* apply to transporting aliens through the South Texas brush country, and must instead be applied based on the specific facts presented to the court. The Fifth Circuit emphasized that it is not enough to say, as the district court had, that traversing an entire geographical region is inherently dangerous, but that it must be dangerous on the facts presented to and used by the district court. The Fifth Circuit identified such pertinent facts from its prior case law as the length of the journey, the temperature, whether the aliens were provided food and water and allowed rest periods, and whether the aliens suffered injuries and death. *See, e.g.*, *United States v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002). Additional facts that have supported the enhancement include: whether the aliens were abandoned en route, the time of year during which the journey took place, the distance traveled, and whether the aliens were adequately clothed for the journey. *See, e.g.*, *United States v. Chapa*, 362 Fed. App'x 411 (5th Cir. 2010); *United States v. De Jesus-Ojeda*, 515 F.3d 434 (5th Cir. 2008); *United States v. Hernandez-Pena*, 267 Fed. App'x 367 (5th Cir. 2008); *United States v. Rodriguez-Cruz*, 255 F.3d 1054 (9th Cir. 2001).

The amendment adds to Application Note 5 the following new example of the conduct to which §2L1.1(b)(6) could apply: "or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements." The Commission determined that this new example will clarify application of subsection (b)(6), highlight the potential risks in these types of cases, provide guidance for the courts to determine whether to apply the enhancement, and promote uniformity in sentencing by providing factors to consider when determining whether to apply §2L1.1(b)(6).

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 786

AMENDMENT: The Commentary to §5D1.2 captioned "Application Notes" is amended in Note 1, in the paragraph that begins "'Sex offense' means", in subparagraph (A), by striking "(ii) chapter 109B of such title;", and by redesignating clauses (iii) through (vi) as clauses (ii) through (v), respectively; in subparagraph (B) by striking "(vi)" and inserting "(v)"; and by adding at the end as the last sentence the following: "Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).".

The Commentary to §5D1.2 captioned "Application Notes" is amended by adding at the end the following new Note 6:

"6. *Application of Subsection (c).*—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.

For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum—a life term of supervised release—be imposed.".

REASON FOR AMENDMENT: This amendment resolves a circuit conflict and a related guideline application issue about the calculation of terms of supervised release. The circuit conflict involves defendants sentenced under statutes providing for mandatory minimum terms of supervised release, while the application issue relates specifically to defendants convicted of failure to register as a sex offender, in violation of 18 U.S.C. § 2250.

The guideline term of supervised release is determined by §5D1.2 (Term of Supervised Release). Section 5D1.2(a) sets forth general rules for determining the guideline term of supervised release, based on the statutory classification of the offense. *See* §5D1.2(a)(1)–(3); 18 U.S.C. § 3559 (sentencing classification of offenses). For certain terrorism-related and sex offenses, §5D1.2(b) operates to replace the top end of the guideline term calculated under subsection (a) with a life term of supervised release. In the case of a "sex offense," as defined by Application Note 1 to §5D1.2, a policy statement recommends that a life term of supervised release be imposed. *See* §5D1.2(b), p.s. Finally, §5D1.2(c) states that "the term of supervised release imposed shall be not less than any statutorily required term of supervised release."

When a Statutory Minimum Term of Supervised Release Applies

First, there appear to be differences among the circuits in how to calculate the guideline term of supervised release when there is a statutory minimum term of supervised release. These cases involve the meaning of subsection (c) and its interaction with subsection (a).

The Seventh Circuit has held that when there is a statutory minimum term of supervised release, the statutory minimum term becomes the bottom of the guideline range (replacing the bottom of the term provided by (a)) and, if the statutory minimum equals or exceeds the top of the guideline term provided by subsection (a), the guideline "range" becomes a single point at the statutory minimum. *United States v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009). Thus, if subsection (a) provides a range of three to five years, but the statute provides a range of five years to life, the "range" is precisely five years. *Gibbs* involved a drug offense for which 21 U.S.C. § 841(b) required a supervised release term of five years to life. *See also United States v. Goodwin*, 717 F.3d 511, 519–20 (7th Cir. 2013) (applying *Gibbs* to a case involving a failure to register for which 18 U.S.C. § 3583(k) required a supervised release term of five years to life).

These cases are in tension with the approach of the Eighth Circuit in *United States v. Deans*, 590 F.3d 907, 911 (8th Cir. 2010). In *Deans*, the range calculated under subsection (a) was two to three years of supervised release. However, the relevant statute, 21 U.S.C. § 841(b)(1)(C), provided a range of three years to life. Under the Seventh Circuit's approach in *Gibbs*, the guideline "range" would be precisely three years. Without reference to *Gibbs*, the Eighth Circuit in *Deans* indicated that the statutory requirement "trumps" subsection (a), and the guideline range becomes the statutory range—three years to life. 590 F.3d at 911. Thus, the district

court's imposition of five years of supervised release "was neither an upward departure nor procedural error." *Id*.

The amendment adopts the approach of the Seventh Circuit in *Gibbs* and *Goodwin*. The amendment provides a new Application Note and examples explaining that, under subsection (c), a statutorily required minimum term of supervised release operates to restrict the low end of the guideline term of supervised release.

The Commission determined that this resolution was most consistent with its statutory obligation to determine the "appropriate length" of supervised release terms, and with how a statutory minimum term of imprisonment operates to restrict the range of imprisonment provided by the guidelines. *See* 28 U.S.C. § 994(a)(1)(c); USSG §5G1.1(a). This outcome is also consistent with the Commission's 2010 report on supervised release, which found that most supervised release violations occur in the first year after release from incarceration. *See* U.S. Sentencing Comm'n, *Federal Offenders Sentenced to Supervised Release*, at 63 & n. 265 (July 2010). If an offender shows non-compliance during the initial term of supervised release, the court may extend the term of supervision up to the statutory maximum, pursuant to 18 U.S.C. § 3583(e)(2).

When the Defendant is Convicted of Failure to Register as a Sex Offender

Second, there are differences among the circuits over how to calculate the guideline range of supervised release when a defendant is convicted, under 18 U.S.C. § 2250, of failing to register as a sex offender. That offense carries a statutory minimum term of supervised release of at least five years, with a term up to life permitted. *See* 18 U.S.C. § 3583(k).

There is an application issue about when, if at all, such an offense is a "sex offense" for purposes of subsection (b) of §5D1.2. If a failure to register is a sex offense, then subsection (b) specifically provides for a term of supervised release of anywhere from the minimum provided by subsection (a) to the maximum provided by statute (*i.e.*, life), and a policy statement contained within subsection (b) recommends that the maximum be imposed. *See* §5D1.2(b), p.s. Another effect of the determination is that, if failure to register is a "sex offense," the guidelines recommend that special conditions of supervised release also be imposed, such as participating in a sex offender monitoring program and submitting to warrantless searches. *See* §5D1.3(d)(7).

Application Note 1 defines "sex offense" to mean, among other things, "an offense, perpetrated against a minor, under" chapter 109B of title 18 (the only section of which is Section 2250). Circuits have reached different conclusions about the effect of this definition.

The Seventh Circuit has held that a failure to register can never be a "sex offense" within the meaning of Note 1. *United States v. Goodwin*, 717 F.3d 511, 518–20 (7th Cir. 2013); *see also United States v. Segura*, 747 F.3d 323, 329 (5th Cir. 2014) (agreeing with *Goodwin*). The court in *Goodwin* reasoned that there is no specific victim of a failure to register, and therefore a failure to register is never "perpetrated against a minor" and can never be a "sex offense"—rendering the definition's inclusion of offenses under chapter 109B "surplusage." 717 F.3d at 518. In an unpublished opinion, the Second Circuit has determined that a failure to register was not a "sex offense." *See United States v. Herbert*, 428 Fed. App'x 37 (2d Cir. 2011). In both cases, the government argued for these outcomes, confessing error below.

There are unpublished decisions in other circuits that have reached different results, without discussion. In those cases, the defendant had a prior sex offense against a minor, and the circuit court determined that the failure to register was a "sex offense." *See United States v. Zeiders*, 440 Fed. App'x 699, 701 (11th Cir. 2011); *United States v. Nelson*, 400 Fed. App'x 781 (4th Cir. 2010).

The Commission agrees with the Seventh Circuit that failure to register is not an offense that is "perpetrated against a minor." In addition, expert testimony and research reviewed by the Commission indicated that commission of a failure-to-register offense is not correlated with sex offense recidivism. The amendment resolves the application issue by amending the commentary to §5D1.2 to clarify that offenses under Section 2250 are not "sex offenses."

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 787

AMENDMENT: The Commentary to §2L1.2 captioned "Application Notes" is amended by redesignating Note 8 as Note 9 and by inserting after Note 7 the following new Note 8:

"8. *Departure Based on Time Served in State Custody*.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). *See* §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.".

The Commentary to §2X5.1 captioned "Application Notes" is amended in Note 1 by inserting after "§5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment" the following: "or Anticipated State Term of Imprisonment".

Section 5G1.3 is amended in the heading by inserting after "Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment" the following: "or Anticipated State Term of Imprisonment".

Section 5G1.3 is amended in subsection (b) by striking "and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)"; by redesignating subsection (c) as (d); and by inserting after subsection (b) the following new subsection (c):

"(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction

under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 2(A) by striking "(i)" and by striking "; and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense";

in Note 2(B) by striking "increased the Chapter Two or Three offense level for the instant offense but";

by redesignating Notes 3 and 4 as Notes 4 and 5, respectively, and inserting after Note 2 the following new Note 3:

"3. *Application of Subsection (c).*—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.";

and in Note 4 (as so redesignated), in the heading, by striking "(c)" and inserting "(d)"; in each of subparagraphs (A), (B), (C), and (D) by striking "(c)" each place such term appears and inserting "(d)"; and in subparagraph (E) by striking "subsection (c)" both places such term appears and inserting "subsection (d)", and by striking "§5G1.3 (c)" and inserting "§5G1.3(d)".

Section 5K2.23 is amended by inserting after "Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment" the following: "or Anticipated Term of Imprisonment".

REASON FOR AMENDMENT: This multi-part amendment addresses certain cases in which the defendant is subject to another term of imprisonment, such as an undischarged term of imprisonment or an anticipated term of imprisonment. The guideline generally applicable to undischarged terms of imprisonment is §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

Section 5G1.3 identifies three categories of cases in which a federal defendant is also subject to an undischarged term of imprisonment. First, there are cases in which the federal offense was committed while the defendant was serving the undischarged term of imprisonment (including work release, furlough, or escape status). In these cases, the federal sentence is to be imposed consecutively to the remainder of the undischarged term of imprisonment. *See* §5G1.3(a). Second, assuming subsection (a) does not apply, there are cases in which the conduct involved in the undischarged term of imprisonment is related to the conduct involved in the federal offense—specifically, the offense for which the defendant is serving an undischarged term of imprisonment is relevant conduct under subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct)—and was the basis for an increase in the offense level under Chapter Two or Chapter Three. In these cases, the court is directed to adjust the federal sentence to account for the time already served on the undischarged term of imprisonment (if the Bureau of Prisons will not itself provide credit for that time already served) and is further directed to run the federal sentence concurrently with the remainder of the sentence for the undischarged term of imprisonment. *See* §5G1.3(b). Finally, in all other cases involving an undischarged state term of imprisonment, the court may impose the federal sentence concurrently,

partially concurrently, or consecutively, to achieve a reasonable punishment for the federal offense. *See* §5G1.3(c), p.s.

Within the category of cases covered by subsection (b), where the conduct involved in the undischarged term of imprisonment is related to the federal offense conduct, the Commission considered whether the benefit of subsection (b) should continue to be limited to cases in which the offense conduct related to the undischarged term of imprisonment resulted in a Chapter Two or Three increase. The Commission determined that this limitation added complexity to the guidelines and may lead to unwarranted disparities. For example, a federal drug trafficking defendant who is serving an undischarged state term of imprisonment for a small amount of a controlled substance that is relevant conduct to the federal offense may not receive the benefit of subsection (b) because the amount of the controlled substance may not be sufficient to increase the offense level under Chapter Two. In contrast, a federal drug trafficking defendant who is serving an undischarged state term of imprisonment for a large amount of a controlled substance that is relevant conduct to the federal offense may be more likely to receive the benefit of subsection (b) because the amount of the controlled substance may be more likely to increase the offense level under Chapter Two. The amendment amends §5G1.3(b) to require a court to adjust the sentence and impose concurrent sentences in any case in which the prior offense is relevant conduct under the provisions of §1B1.3(a)(1), (a)(2), or (a)(3), regardless of whether the conduct from the prior offense formed the basis for a Chapter Two or Chapter Three increase. The Commission determined that this amendment will simplify the operation of §5G1.3(b) and will also address concerns that the requirement that the relevant conduct increase the offense level under Chapters Two or Three is somewhat arbitrary.

Second, the amendment addresses cases in which there is an anticipated, but not yet imposed, state term of imprisonment that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). This amendment creates a new subsection (c) at §5G1.3 that directs the court to impose the sentence for the instant federal offense to run concurrently with the anticipated but not yet imposed period of imprisonment if §5G1.3(a) does not apply.

This amendment is a further response to the Supreme Court's decision in *Setser v. United States*, 132 S. Ct. 1463 (2012). Last year, the Commission amended the Background Commentary to §5G1.3 to provide heightened awareness of the court's authority under *Setser*. *See* USSG App. C, Amend. 776 (effective November 1, 2013). In *Setser*, the Supreme Court held that a federal sentencing court has the authority to order that a federal term of imprisonment run concurrent with, or consecutive to, an anticipated but not yet imposed state sentence. This amendment reflects the Commission's determination that the concurrent sentence benefits of subsection (b) of §5G1.3 should be available not only in cases in which the state sentence has already been imposed at the time of federal sentencing (as subsection (b) provides), but also in cases in which the state sentence is anticipated but has not yet been imposed, as long as the other criteria in subsection (b) are satisfied (*i.e.*, the state offense is relevant conduct under subsections (a)(1), (a)(2), or (a)(3) of §1B1.3, and subsection (a) of §5G1.3 does not apply). By requiring courts to impose a concurrent sentence in these cases, the amendment reduces disparities between defendants whose state sentences have already been imposed and those whose state sentences have not yet been imposed. The amendment also promotes certainty and consistency.

Third, the amendment addresses certain cases in which the defendant is an alien and is subject to an undischarged term of imprisonment. The amendment provides a new departure provision in §2L1.2 (Unlawfully Entering or Remaining in the United States) for cases in which the defendant is located by immigration authorities while the defendant is in state custody, whether pre- or post- conviction, for a state offense unrelated to the federal illegal reentry offense. In such a case, the time served is not covered by an adjustment under §5G1.3(b) and,

accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). The new departure provision states that, in such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody for the unrelated offense, from the time federal immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. The new departure provision also sets forth factors for the court to consider in determining whether to provide such a departure, and states that a departure should be considered only if the departure will not increase the risk to the public from further crimes of the defendant.

This amendment addresses concerns that the amount of time a defendant serves in state custody after being located by immigration authorities may be somewhat arbitrary. Several courts have recognized a downward departure to account for the delay between when the defendant is "found" by immigration authorities and when the defendant is brought into federal custody. *See, e.g.*, *United States v. Sanchez-Rodriguez*, 161 F.3d 556, 563–64 (9th Cir. 1998) (affirming downward departure on the basis that, because of the delay in proceeding with the illegal reentry case, the defendant lost the opportunity to serve a greater portion of his state sentence concurrently with his illegal reentry sentence); *United States v. Barrera-Saucedo*, 385 F.3d 533, 537 (5th Cir. 2004) (holding that "it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody"); *see also United States v. Los Santos*, 283 F.3d 422, 428–29 (2d Cir. 2002) (departure appropriate if the delay was either in bad faith or unreasonable). The amendment provides guidance to the courts in the determination of an appropriate sentence in such a case.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 788

AMENDMENT: Section 1B1.10, as amended by Amendment 780, is further amended in subsection (d) by striking "and" and by inserting ", and 782 (subject to subsection (e)(1))" before the period at the end;

and by adding at the end the following new subsection (e):

"(e) *Special Instruction*.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.".

The Commentary to 1B1.10 captioned "Application Notes", as amended by Amendment 780, is further amended by redesignating Notes 6 and 7 as Notes 7 and 8, respectively;

and by inserting after Note 5 the following new Note 6:

"6. *Application to Amendment 782*.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.".

REASON FOR AMENDMENT: This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. The Commission has determined that Amendment 782, subject to the limitation in new §1B1.10(e) delaying the effective date of sentence reduction orders until November 1, 2015, should be applied retroactively.

Amendment 782 reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties in §2D1.1, and made parallel changes to §2D1.11. Under the applicable standards set forth in the background commentary to §1B1.10, the Commission considers the following factors, among others: (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. *See* §1B1.10, comment. (backg'd.). Applying those standards to Amendment 782, the Commission determined that, among other factors:

(1) The purposes of the amendment are to reflect the Commission's determination that setting the base offense levels above mandatory minimum penalties is no longer necessary and that a reduction would be an appropriate step toward alleviating the overcapacity of the federal prisons. *See* 28 U.S.C. § 994(g) (requiring the Commission to formulate guidelines to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons").

(2) The number of cases potentially involved is large, and the magnitude of the change in the guideline range is significant. The Commission determined that an estimated 46,000 offenders may benefit from retroactive application of Amendment 782 subject to the limitation in §1B1.10(e), and the average sentence reduction would be approximately 18 percent.

(3) The administrative burdens of applying Amendment 782 retroactively are significant but manageable given the one-year delay in the effective date, which allows courts and agencies more time to prepare. This determination was informed by testimony at the Commission's June 10, 2014 public hearing on retroactivity and by other public comment received by the Commission.

The Commission determined that public safety, among other factors, requires a limitation on retroactive application of Amendment 782. In light of the large number of cases potentially involved, the Commission determined that the agencies of the federal criminal justice system responsible for the offenders' reentry into society need time to prepare, and to help the offenders prepare, for that reentry. For example, the Bureau of Prisons has the responsibility under 18 U.S.C. § 3624(c) to ensure, to the extent practicable, that the defendant will spend a portion of his or her term of imprisonment under conditions that will afford the defendant a reasonable opportunity to adjust to and prepare for his or her reentry into the community. The Commission received testimony indicating that some offenders released pursuant to earlier retroactive guideline amendments had been released without having had this opportunity. In addition,

for many of the defendants potentially involved, their sentence includes a term of supervised release after imprisonment. The judiciary and its probation officers will have the responsibility under 18 U.S.C. § 3624(e) to supervise those defendants when they are released by the Bureau of Prisons. The Commission received testimony from the Criminal Law Committee of the Judicial Conference of the United States that a delay would permit courts and probation offices to prepare to effectively supervise this increased number of defendants.

The Commission concluded that a one-year delay in the effective date of any orders granting sentence reductions under Amendment 782 is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all offenders who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit those agencies that will be responsible for offenders after their release to prepare for the increased responsibility. Therefore, the Commission added a Special Instruction at subsection (e) providing that a reduced term of imprisonment based on retroactive application of Amendment 782 shall not be ordered unless the effective date of the court's order is November 1, 2015, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before November 1, 2015, as long as any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later. As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.

In addition, public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. *See* §1B1.10, comment. (n.1(B)(ii)).

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 789

AMENDMENT: Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) is amended by striking "127 S. Ct. 2456" and inserting "551 U.S. 338"; by striking "2463" and inserting "347–48"; by striking "wholesale,' *id*.," and inserting "wholesale[,]' *id*. at 348"; by striking "*Id*. at 2464" the first time it appears and inserting "*Id*. at 350"; by striking "127 S. Ct. at 2465" both places such term appears and inserting "551 U.S. at 351"; by striking "128 S. Ct. 586, 596" and inserting "552 U.S. 38, 49"; by striking "128 S. Ct. at 597" and inserting "552 U.S. at 51"; by striking "*Id*. at 2464" the second time it appears and inserting "*Rita*, 551 U.S. at 350"; by striking "128 S. Ct. at 594" and inserting "552 U.S. at 46"; by striking "128 S. Ct. 558" and inserting "552 U.S. 85"; and by striking "571" and inserting "103".

The Commentary to §1B1.1 captioned "Background" is amended by striking "128 S. Ct. 2198, 2200–03" and inserting "553 U.S. 708, 709–16".

The Commentary to §1B1.10 captioned "Background", as amended by Amendment 780, is further amended by striking "130 S. Ct. 2683" and inserting "560 U.S. 817".

The Commentary to §2M3.1 captioned "Application Notes" is amended in Note 1 by striking "50 U.S.C. § 435 note" and inserting "50 U.S.C. § 3161 note".

The Commentary to §5G1.3 captioned "Application Notes", as amended by Amendment 787, is further amended in Note 2(A) by striking "subsection (c)" and inserting "subsection (d)".

REASON FOR AMENDMENT: This amendment makes certain technical changes to the Introduction and the Commentary in the *Guidelines Manual*.

First, the amendment makes clerical changes to provide United States Reports citations for certain Supreme Court cases. The changes are made to—

(1) Subpart 2 of Part A of Chapter One (Introduction, Authority, and General Application Principles);

(2) the Background Commentary to §1B1.1 (Application Instructions); and

(3) the Background Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)).

Second, the amendment makes a clerical change to Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to reflect the editorial reclassification of a section in the United States Code.

Finally, the amendment makes a technical and conforming change to Application Note 2(A) to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to reflect that subsection (c) was redesignated as subsection (d) by Amendment 787.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 790

AMENDMENT: Section 1B1.3(a)(1)(B) is amended by striking "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity," and inserting the following:

"all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;".

The Commentary to §1B1.3 captioned "Application Notes" is amended by striking Note 2 as follows:

"2. A 'jointly undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(A) in furtherance of the jointly undertaken criminal activity; and

(B) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the 'jointly undertaken criminal activity') is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (*e.g.*, in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

Illustrations of Conduct for Which the Defendant is Accountable

(a) *Acts and omissions aided or abetted by the defendant*

(1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) *Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable*

(1) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the

assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(c) *Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity*

(1) Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (*i.e.*, the forgery of the $800 check).

(2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.

(3) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (*see* the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who pur-

chases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (*i.e.*, the one delivery).

(6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

(7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

(8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation

efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.";

by redesignating Notes 3 through 10 as Notes 5 through 12, respectively, and inserting the following new Notes 2, 3, and 4:

"2. *Accountability Under More Than One Provision*.—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

3. *Jointly Undertaken Criminal Activity (Subsection (a)(1)(B))*.—

(A) *In General*.—A 'jointly undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

(i) within the scope of the jointly undertaken criminal activity;

(ii) in furtherance of that criminal activity; and

(iii) reasonably foreseeable in connection with that criminal activity.

The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (*i.e.*, 'within the scope,' 'in furtherance,' and 'reasonably foreseeable') is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

(B) *Scope*.—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the 'jointly undertaken

criminal activity' is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (*e.g.*, in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

(C) *In Furtherance*.—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.

(D) *Reasonably Foreseeable*.—The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. *Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).—*

(A) *Acts and omissions aided or abetted by the defendant*.—

(i) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case

(the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. *See* Application Note 2.

(B) *Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity*.—

(i) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(C) *Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable*.—

(i) Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not within the scope of the jointly undertaken criminal activity (*i.e.*, the forgery of the $800 check).

(ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.

(iii) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (*see* the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (*i.e.*, the one delivery).

(vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug

dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

(vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (*i.e.*, the 500 grams).

(viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. *See* Application Note 3(B).".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 14(E) by striking "Application Note 9" both places such term appears and inserting "Application Note 11".

The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 by striking "Application Note 10" and inserting "Application Note 12".

The Commentary to §2X4.1 captioned "Application Notes" is amended in Note 1 by striking "Application Note 10" and inserting "Application Note 12".

REASON FOR AMENDMENT: This amendment is a result of the Commission's effort to clarify the use of relevant conduct in offenses involving multiple participants.

The amendment makes clarifying revisions to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)). It restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under §1B1.3(a)(1)(B). The three-step analysis requires that the court (1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Prior to this amendment, the "scope" element of the three-step analysis was identified in the commentary to §1B1.3 but was not included in the text of the guideline itself. This amendment makes clear that, under the "jointly undertaken criminal activity" provision, a defendant is accountable for the conduct of others in a jointly undertaken criminal activity if the conduct meets all three criteria of the three-step analysis. This amendment is not intended as a substantive change in policy.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 791

AMENDMENT: Section 2B1.1(b) is amended by striking paragraph (1) as follows:

"(1) If the loss exceeded $5,000, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	$5,000 or less	no increase
(B)	More than $5,000	add 2
(C)	More than $10,000	add 4
(D)	More than $30,000	add 6
(E)	More than $70,000	add 8
(F)	More than $120,000	add 10
(G)	More than $200,000	add 12
(H)	More than $400,000	add 14
(I)	More than $1,000,000	add 16
(J)	More than $2,500,000	add 18
(K)	More than $7,000,000	add 20
(L)	More than $20,000,000	add 22
(M)	More than $50,000,000	add 24
(N)	More than $100,000,000	add 26
(O)	More than $200,000,000	add 28
(P)	More than $400,000,000	add 30.";

and inserting the following:

"(1) If the loss exceeded $6,500, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	$6,500 or less	no increase
(B)	More than $6,500	add 2

(C)	More than $15,000	add 4
(D)	More than $40,000	add 6
(E)	More than $95,000	add 8
(F)	More than $150,000	add 10
(G)	More than $250,000	add 12
(H)	More than $550,000	add 14
(I)	More than $1,500,000	add 16
(J)	More than $3,500,000	add 18
(K)	More than $9,500,000	add 20
(L)	More than $25,000,000	add 22
(M)	More than $65,000,000	add 24
(N)	More than $150,000,000	add 26
(O)	More than $250,000,000	add 28
(P)	More than $550,000,000	add 30.".

Section 2B1.4(b)(1) is amended by striking "$5,000" and inserting "$6,500".

Section 2B1.5(b)(1) is amended by striking "$2,000" and inserting "$2,500"; and by striking "$5,000" both places such term appears and inserting "$6,500".

Section 2B2.1(b) is amended by striking paragraph (2) as follows:

"(2) If the loss exceeded $2,500, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	$2,500 or less	no increase
(B)	More than $2,500	add 1
(C)	More than $10,000	add 2
(D)	More than $50,000	add 3
(E)	More than $250,000	add 4
(F)	More than $800,000	add 5
(G)	More than $1,500,000	add 6
(H)	More than $2,500,000	add 7
(I)	More than $5,000,000	add 8.";

and inserting the following:

"(2) If the loss exceeded $5,000, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	$5,000 or less	no increase
(B)	More than $5,000	add 1
(C)	More than $20,000	add 2
(D)	More than $95,000	add 3
(E)	More than $500,000	add 4
(F)	More than $1,500,000	add 5
(G)	More than $3,000,000	add 6
(H)	More than $5,000,000	add 7
(I)	More than $9,500,000	add 8.".

Section 2B2.3(b)(3) is amended by striking "$2,000" and inserting "$2,500"; and by striking "$5,000" both places such term appears and inserting "$6,500".

Amendment 791

Section 2B3.1(b) is amended by striking paragraph (7) as follows:

"(7) If the loss exceeded $10,000, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	$10,000 or less	no increase
(B)	More than $10,000	add 1
(C)	More than $50,000	add 2
(D)	More than $250,000	add 3
(E)	More than $800,000	add 4
(F)	More than $1,500,000	add 5
(G)	More than $2,500,000	add 6
(H)	More than $5,000,000	add 7.";

and inserting the following:

"(7) If the loss exceeded $20,000, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	$20,000 or less	no increase
(B)	More than $20,000	add 1
(C)	More than $95,000	add 2
(D)	More than $500,000	add 3
(E)	More than $1,500,000	add 4
(F)	More than $3,000,000	add 5
(G)	More than $5,000,000	add 6
(H)	More than $9,500,000	add 7.".

Section 2B3.2(b)(2) is amended by striking "$10,000" and inserting "$20,000".

Sections 2B3.3(b)(1), 2B4.1(b)(1), 2B5.1(b)(1), 2B5.3(b)(1), and 2B6.1(b)(1) are each amended by striking "$2,000" and inserting "$2,500"; and by striking "$5,000" both places such term appears and inserting "$6,500".

Sections 2C1.1(b)(2), 2C1.2(b)(2), and 2C1.8(b)(1) are each amended by striking "$5,000" and inserting "$6,500".

Sections 2E5.1(b)(2) and 2Q2.1(b)(3) are each amended by striking "$2,000" and inserting "$2,500"; and by striking "$5,000" both places such term appears and inserting "$6,500".

Section 2R1.1(b) is amended by striking paragraph (2) as follows:

"(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

	Volume of Commerce (Apply the Greatest)	*Adjustment to Offense Level*
(A)	More than $1,000,000	add 2
(B)	More than $10,000,000	add 4
(C)	More than $40,000,000	add 6

(D)	More than $100,000,000	add 8
(E)	More than $250,000,000	add 10
(F)	More than $500,000,000	add 12
(G)	More than $1,000,000,000	add 14
(H)	More than $1,500,000,000	add 16.”;

and inserting the following:

“(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

	Volume of Commerce (Apply the Greatest)	*Adjustment to Offense Level*
(A)	More than $1,000,000	add 2
(B)	More than $10,000,000	add 4
(C)	More than $50,000,000	add 6
(D)	More than $100,000,000	add 8
(E)	More than $300,000,000	add 10
(F)	More than $600,000,000	add 12
(G)	More than $1,200,000,000	add 14
(H)	More than $1,850,000,000	add 16.”.

Section 2T3.1(a) is amended by striking “$1,000” both places such term appears and inserting “$1,500”; and by striking “$100” both places such term appears and inserting “$200”.

Section 2T4.1 is amended by striking the following:

“

	Tax Loss (Apply the Greatest)	*Offense Level*
(A)	$2,000 or less	6
(B)	More than $2,000	8
(C)	More than $5,000	10
(D)	More than $12,500	12
(E)	More than $30,000	14
(F)	More than $80,000	16
(G)	More than $200,000	18
(H)	More than $400,000	20
(I)	More than $1,000,000	22
(J)	More than $2,500,000	24
(K)	More than $7,000,000	26
(L)	More than $20,000,000	28
(M)	More than $50,000,000	30
(N)	More than $100,000,000	32
(O)	More than $200,000,000	34
(P)	More than $400,000,000	36.”;

and inserting the following:

“

	Tax Loss (Apply the Greatest)	*Offense Level*
(A)	$2,500 or less	6
(B)	More than $2,500	8
(C)	More than $6,500	10

(D)	More than $15,000	12
(E)	More than $40,000	14
(F)	More than $100,000	16
(G)	More than $250,000	18
(H)	More than $550,000	20
(I)	More than $1,500,000	22
(J)	More than $3,500,000	24
(K)	More than $9,500,000	26
(L)	More than $25,000,000	28
(M)	More than $65,000,000	30
(N)	More than $150,000,000	32
(O)	More than $250,000,000	34
(P)	More than $550,000,000	36.”;

Section 5E1.2 is amended in subsection (c)(3) by striking the following:

“

Fine Table

Offense Level	*A Minimum*	*B Maximum*
3 and below	$100	$5,000
4–5	$250	$5,000
6–7	$500	$5,000
8–9	$1,000	$10,000
10–11	$2,000	$20,000
12–13	$3,000	$30,000
14–15	$4,000	$40,000
16–17	$5,000	$50,000
18–19	$6,000	$60,000
20–22	$7,500	$75,000
23–25	$10,000	$100,000
26–28	$12,500	$125,000
29–31	$15,000	$150,000
32–34	$17,500	$175,000
35–37	$20,000	$200,000
38 and above	$25,000	$250,000.”,

and inserting the following:

“

Fine Table

Offense Level	*A Minimum*	*B Maximum*
3 and below	$200	$9,500
4–5	$500	$9,500
6–7	$1,000	$9,500
8–9	$2,000	$20,000
10–11	$4,000	$40,000
12–13	$5,500	$55,000
14–15	$7,500	$75,000
16–17	$10,000	$95,000
18–19	$10,000	$100,000

20–22	$15,000	$150,000
23–25	$20,000	$200,000
26–28	$25,000	$250,000
29–31	$30,000	$300,000
32–34	$35,000	$350,000
35–37	$40,000	$400,000
38 and above	$50,000	$500,000.”;

in subsection (c)(4) by striking “$250,000” and inserting “$500,000”;

and by inserting after subsection (g) the following new subsection (h):

“(h) Special Instruction

(1) For offenses committed prior to November 1, 2015, use the applicable fine guideline range that was set forth in the version of §5E1.2(c) that was in effect on November 1, 2014, rather than the applicable fine guideline range set forth in subsection (c) above.”.

Section 8C2.4 is amended in subsection (d) by striking the following:

“ *Offense Level Fine Table*

Offense Level	*Amount*
6 or less	$5,000
7	$7,500
8	$10,000
9	$15,000
10	$20,000
11	$30,000
12	$40,000
13	$60,000
14	$85,000
15	$125,000
16	$175,000
17	$250,000
18	$350,000
19	$500,000
20	$650,000
21	$910,000
22	$1,200,000
23	$1,600,000
24	$2,100,000
25	$2,800,000
26	$3,700,000
27	$4,800,000
28	$6,300,000
29	$8,100,000
30	$10,500,000
31	$13,500,000
32	$17,500,000
33	$22,000,000
34	$28,500,000

35	$36,000,000
36	$45,500,000
37	$57,500,000
38 or more	$72,500,000.",

and inserting the following:

"

Offense Level Fine Table

Offense Level	*Amount*
6 or less	$8,500
7	$15,000
8	$15,000
9	$25,000
10	$35,000
11	$50,000
12	$70,000
13	$100,000
14	$150,000
15	$200,000
16	$300,000
17	$450,000
18	$600,000
19	$850,000
20	$1,000,000
21	$1,500,000
22	$2,000,000
23	$3,000,000
24	$3,500,000
25	$5,000,000
26	$6,500,000
27	$8,500,000
28	$10,000,000
29	$15,000,000
30	$20,000,000
31	$25,000,000
32	$30,000,000
33	$40,000,000
34	$50,000,000
35	$65,000,000
36	$80,000,000
37	$100,000,000
38 or more	$150,000,000.";

and by inserting after subsection (d) the following new subsection (e):

"(e) Special Instruction

(1) For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014, rather than the offense level fine table set forth in subsection (d) above.".

REASON FOR AMENDMENT: This amendment makes adjustments to the monetary tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine) to account for inflation. The amendment adjusts the amounts in each of the seven monetary tables using a specific multiplier derived from the Consumer Price Index (CPI), and then rounds—

- amounts greater than $100,000,000 to the nearest multiple of $50,000,000;
- amounts greater than $10,000,000 to the nearest multiple of $5,000,000;
- amounts greater than $1,000,000 to the nearest multiple of $500,000;
- amounts greater than $100,000 to the nearest multiple of $50,000;
- amounts greater than $10,000 to the nearest multiple of $5,000;
- amounts greater than $1,000 to the nearest multiple of $500; and
- amounts of $1,000 or less to the nearest multiple of $50.

In addition, the amendment includes conforming changes to other Chapter Two guidelines that refer to the monetary tables.

Congress has generally mandated that agencies in the executive branch adjust the civil monetary penalties they impose to account for inflation using the CPI. *See* 28 U.S.C. § 2461 note (Federal Civil Penalties Inflationary Adjustment Act of 1990). Although the Commission's work does not involve civil monetary penalties, it does establish appropriate criminal sentences for categories of offenses and offenders, including appropriate amounts for criminal fines. While some of the monetary values in the Chapter Two guidelines have been revised since they were originally established in 1987, none of the tables has been specifically revised to account for inflation.

Due to inflationary changes, there has been a gradual decrease in the value of the dollar over time. As a result, monetary losses in current offenses reflect, to some degree, a lower degree of harm and culpability than did equivalent amounts when the monetary tables were established or last substantively amended. Similarly, the fine levels recommended by the guidelines are lower in value than when they were last adjusted, and therefore, do not have the same sentencing impact as a similar fine in the past. Based on its analysis and widespread support for inflationary adjustments expressed in public comment, the Commission concluded that aligning the above monetary tables with modern dollar values is an appropriate step at this time.

The amendment adjusts each table based on inflationary changes since the year each monetary table was last substantially amended:

- Loss table in §2B1.1 and tax table in §2T4.1: adjusting for inflation from 2001 ($1.00 in 2001 = $1.34 in 2014);

- Loss tables in §§2B2.1 and 2B3.1 and fine table for individual defendants at §5E1.2(c)(3): adjusting for inflation from 1989 ($1.00 in 1989 = $1.91 in 2014);

- Volume of Commerce table in §2R1.1: adjusting for inflation from 2005 ($1.00 in 2005 = $1.22 in 2014); and

- Fine table for organizational defendants at §8C2.4(d): adjusting for inflation from 1991 ($1.00 in 1991 = $1.74 in 2014).

Adjusting from the last substantive amendment year appropriately accounts for the Commission's previous work in revising these tables at various times. Although not specifically focused

on inflationary issues, previous Commissions engaged in careful examination (and at times, a wholesale rewriting) of the monetary tables and ultimately included monetary and enhancement levels that it considered appropriate at that time. The Commission estimates that this amendment would result in the Bureau of Prisons having approximately 224 additional prison beds available at the end of the first year after implementation, and approximately 956 additional prison beds available at the end of its fifth year of implementation.

Finally, the amendment adds a special instruction to both §§5E1.2 and 8C2.4 providing that, for offenses committed prior to November 1, 2015, the court shall use the fine provisions that were in effect on November 1, 2014, rather than the fine provisions as amended for inflation. This addition responds to concerns expressed in public comment that changes to the fine tables might create *ex post facto* problems. It ensures that an offender whose offense level is calculated under the current *Guidelines Manual* is not subject to the inflated fine provisions if his or her offense was committed prior to November 1, 2015. Such guidance is similar to that provided in the commentary to §5E1.3 (Special Assessment) relating to the amount of the special assessment to be imposed in a given case.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 792

AMENDMENT: Section 2B1.1 is amended in subsection (b)(2) by striking the following:

"(Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;

(B) involved 50 or more victims, increase by 4 levels; or

(C) involved 250 or more victims, increase by 6 levels.",

and inserting the following:

"(Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.";

in subsection (b)(10)(C) by inserting after "the offense otherwise involved sophisticated means" the following: "and the defendant intentionally engaged in or caused the conduct constituting sophisticated means";

and in subsection (b)(16)(B) by inserting "or" at the end of subdivision (i), and by striking "; or (iii) substantially endangered the solvency or financial security of 100 or more victims".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(A)(ii) by striking "(I) means the pecuniary harm that was intended to result from the offense; and" and inserting "(I) means the pecuniary harm that the defendant purposely sought to inflict; and";

in Note 3(F)(ix) by striking "there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—" and inserting "the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—";

in Note 4 by striking "50 victims" and inserting "10 victims" at subdivision (C)(ii); and by inserting at the end the following new subdivision (F):

"(F) *Substantial Financial Hardship*.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

(i) becoming insolvent;

(ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);

(iii) suffering substantial loss of a retirement, education, or other savings or investment fund;

(iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;

(v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and

(vi) suffering substantial harm to his or her ability to obtain credit.";

in Note 9 by striking "Sophisticated Means Enhancement under" in the heading and inserting "Application of"; and by inserting at the end of the heading of subdivision (B) the following: "under Subsection (b)(10)(C)";

and in Note 20(A)(vi) by striking both "or credit record" and "or a damaged credit record".

REASON FOR AMENDMENT: This amendment makes several changes to the guideline applicable to economic crimes, §2B1.1 (Theft, Property Destruction, and Fraud), to better account for harm to victims, individual culpability, and the offender's intent. This amendment is a result of the Commission's multi-year study of §2B1.1 and related guidelines, and follows extensive data collection and analysis relating to economic offenses and offenders. Using this Commission data, combined with legal analysis and public comment, the Commission identified a number of specific areas where changes were appropriate.

Victims Table

First, the amendment revises the victims table in §2B1.1(b)(2) to specifically incorporate substantial financial hardship to victims as a factor in sentencing economic crime offenders. As amended, the first tier of the victims table provides for a 2-level enhancement where the offense involved 10 or more victims or mass-marketing, or if the offense resulted in substantial

financial hardship to one or more victims. The 4-level enhancement applies if the offense resulted in substantial financial hardship to five or more victims, and the 6-level enhancement applies if the offense resulted in substantial financial hardship to 25 or more victims. As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, is also revised to refer to 10 rather than 50 victims.

In addition, the amendment adds a non-exhaustive list of factors for courts to consider in determining whether the offense caused substantial financial hardship. These factors include: becoming insolvent; filing for bankruptcy; suffering substantial loss of a retirement, education, or other savings or investment fund; making substantial changes to employment; making substantial changes to living arrangements; or suffering substantial harm to the victim's ability to obtain credit. Two conforming changes are also included. First, one factor—substantial harm to ability to obtain credit—was previously included in Application Note 20(A)(vi) as a potential departure consideration. The amendment removes this language from the Application Note. Second, the amendment deletes subsection (b)(16)(B)(iii), which provided for an enhancement where an offense substantially endangered the solvency or financial security of 100 or more victims.

The Commission continues to believe that the number of victims is a meaningful measure of the harm and scope of an offense and can be indicative of its seriousness. It is for this reason that the amended victims table maintains the 2-level enhancement for offenses that involve 10 or more victims or mass marketing. However, the revisions to the victims table also reflect the Commission's conclusion that the guideline should place greater emphasis on the extent of harm that particular victims suffer as a result of the offense. Consistent with the Commission's overall goal of focusing more on victim harm, the revised victims table ensures that an offense that results in even one victim suffering substantial financial harm receives increased punishment, while also lessening the cumulative impact of loss and the number of victims, particularly in high-loss cases.

Intended Loss

Second, the amendment revises the commentary at §2B1.1, Application Note 3(A)(ii), which has defined intended loss as "pecuniary harm that was intended to result from the offense." In interpreting this provision, courts have expressed some disagreement as to whether a subjective or an objective inquiry is required. *Compare United States v. Manatau*, 647 F.3d 1048 (10th Cir. 2011) (holding that a subjective inquiry is required), *United States v. Diallo*, 710 F.3d 147, 151 (3d Cir. 2013) ("To make this determination, we look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims."), *United States v. Confredo*, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had "proven a subjective intent to cause a loss of less than the aggregate amount" of fraudulent loans), and *United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003) ("our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level"), *with United States v. Innarelli*, 524 F.3d 286, 291 (1st Cir. 2008) ("we focus our loss inquiry for purposes of determining a defendant's offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes") and *United States v. Lane*, 323 F.3d 568, 590 (7th Cir. 2003) ("The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct").

The amendment adopts the approach taken by the Tenth Circuit by revising the commentary in Application Note 3(A)(ii) to provide that intended loss means the pecuniary harm that "the defendant purposely sought to inflict." The amendment reflects the Commission's continued belief that intended loss is an important factor in economic crime offenses, but also recognizes

that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant's culpability.

Sophisticated Means

Third, the amendment narrows the focus of the specific offense characteristic at §2B1.1(b)(10)(C) to cases in which the defendant intentionally engaged in or caused conduct constituting sophisticated means. Prior to the amendment, the enhancement applied if "the offense otherwise involved sophisticated means." Based on this language, courts had applied this enhancement on the basis of the sophistication of the overall scheme without a determination of whether the defendant's own conduct was "sophisticated." *See, e.g.*, *United States v. Green*, 648 F.3d 569, 576 (7th Cir. 2011); *United States v. Bishop-Oyedepo*, 480 Fed. App'x 431, 433–34 (7th Cir. 2012); *United States v. Jenkins-Watt*, 574 F.3d 950, 965 (8th Cir. 2009). The Commission concluded that basing the enhancement on the defendant's own intentional conduct better reflects the defendant's culpability and will appropriately minimize application of this enhancement to less culpable offenders.

Fraud on the Market

Finally, the amendment revises the special rule at Application Note 3(F)(ix) relating to the calculation of loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. When this special rule was added to the guidelines, it established a rebuttable presumption that the specified loss calculation methodology provides a reasonable estimate of the actual loss in such cases. As amended, the method provided in the special rule is no longer the presumed starting point for calculating loss in these cases. Instead, the revised special rule states that the provided method is one method that courts may consider, but that courts, in determining loss, are free to use any method that is appropriate and practicable under the circumstances. This amendment reflects the Commission's view that the most appropriate method to determine a reasonable estimate of loss will often vary in these highly complex and fact-intensive cases.

This amendment, in combination with related revisions to the mitigating role guideline at §3B1.2 (Mitigating Role), reflects the Commission's overall goal of focusing the economic crime guideline more on qualitative harm to victims and individual offender culpability.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 793

AMENDMENT: Section 2D1.1(c) is amended in each of subdivisions (5), (6), (7), (8), and (9) by striking the lines referenced to Schedule III Hydrocodone;

and in each of subdivisions (10), (11), (12), (13), (14), (15), (16), and (17) by striking the lines referenced to Schedule III Hydrocodone, and in the lines referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking "or Hydrocodone".

The annotation to §2D1.1(c) captioned "Notes to Drug Quantity Table" is amended in Note (B) in the last paragraph by striking "The term 'Oxycodone (actual)' refers" and inserting "The terms 'Hydrocodone (actual)' and 'Oxycodone (actual)' refer".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8(D), under the heading relating to Schedule I or II Opiates, by striking the line referenced to Hydrocodone/Dihydrocodeinone and inserting the following:

"1 gm of Hydrocodone (actual) = 6700 gm of marihuana";

in the heading relating to Schedule III Substances (except ketamine and hydrocodone) by striking "and hydrocodone" both places such term appears;

and in the heading relating to Schedule III Hydrocodone by striking the heading and subsequent paragraphs as follows:

"*Schedule III Hydrocodone*****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

*****Provided, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 2,999.99 kilograms of marihuana.";

and in Note 27(C) by inserting after "methamphetamine," the following: "hydrocodone,".

Reason for Amendment: This amendment changes the way the primary drug trafficking guideline calculates a defendant's drug quantity in cases involving hydrocodone in response to recent administrative actions by the Food and Drug Administration and the Drug Enforcement Administration. The amendment adopts a marihuana equivalency for hydrocodone (1 gram equals 6700 grams of marihuana) based on the weight of the hydrocodone alone.

In 2013 and 2014, the Food and Drug Administration approved several new pharmaceuticals containing hydrocodone which can contain up to twelve times as much hydrocodone in a single pill than was previously available. Separately, in October 2014, the Drug Enforcement Administration moved certain commonly-prescribed pharmaceuticals containing hydrocodone from the less-restricted Schedule III to the more-restricted Schedule II. Among other things, the scheduling doubled the statutory maximum term of imprisonment available for trafficking in the pharmaceuticals that were previously controlled under Schedule III from 10 years to 20 years. The change also rendered obsolete the entries in the Drug Quantity Table and Drug Equivalency Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that set a marihuana equivalency for the pharmaceuticals that were previously controlled under Schedule III.

As a result of these administrative actions, all pharmaceuticals that include hydrocodone are now subject to the same statutory penalties. There is wide variation in the amount of hydrocodone available in these pharmaceuticals and in the amount of other ingredients (such as binders, coloring, acetaminophen, etc.) they contain. This variation raises significant proportionality issues within §2D1.1, where drug quantity for hydrocodone offenses has previously been calculated based on the weight of the entire substance that contains hydrocodone or on the number of pills. Neither of these calculations directly took into account the amount of actual hydrocodone in the pills.

The amendment addresses these changed circumstances by setting a new marihuana equivalency for hydrocodone based on the weight of the hydrocodone alone. Without this change, defendants with less actual hydrocodone could have received a higher guideline range than

those with more hydrocodone because pills with less hydrocodone can sometimes contain more non-hydrocodone ingredients, leading the lower-dose pills to weigh more.

In setting the marihuana equivalency, the Commission considered: potency of the drug, medical use of the drug, and patterns of abuse and trafficking, such as prevalence of abuse, consequences of misuse including death or serious bodily injury from use, and incidence of violence associated with its trafficking. The Commission noted that the Drug Enforcement Administration's rescheduling decision relied in part on the close relationship between hydrocodone and oxycodone, a similar and commonly-prescribed drug that was already controlled under Schedule II. Scientific literature, public comment, and testimony supported the conclusion that the potency, medical use, and patterns of abuse and trafficking of hydrocodone are very similar to oxycodone. In particular, the Commission heard testimony from abuse liability specialists and reviewed scientific literature indicating that, in studies conducted under standards established by the Food and Drug Administration for determining the abuse liability of a particular drug, the potencies of hydrocodone and oxycodone when abused are virtually identical, even though some physicians who prescribe the two drugs in a clinical setting might not prescribe them in equal doses. Public comment indicated that both hydrocodone and oxycodone are among the top ten drugs most frequently encountered by law enforcement and that their methods of diversion and rates of diversion per kilogram of available drug are similar. Public comment and review of the scientific literature also indicated that the users of the two drugs share similar characteristics, and that some users may use them interchangeably, a situation which may become more common as the more powerful pharmaceuticals recently approved by the Food and Drug Administration become available.

Based on proportionality considerations and the Commission's assessment that, for purposes of the drug guideline, hydrocodone and oxycodone should be treated equivalently, the amendment adopts a marihuana equivalency for hydrocodone (actual) that is the same as the existing equivalency for oxycodone (actual): 1 gram equals 6,700 grams of marihuana.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 794

AMENDMENT: The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by inserting after "that makes him substantially less culpable than the average participant" the following: "in the criminal activity", by striking "concerted" and inserting "the", by striking "is not precluded from consideration for" each place such term appears and inserting "may receive", by striking "role" both places such term appears and inserting "participation", and by striking "personal gain from a fraud offense and who had limited knowledge" and inserting "personal gain from a fraud offense or who had limited knowledge";

in Note 3(C) by inserting at the end the following new paragraphs:

"In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;

(ii) the degree to which the defendant participated in planning or organizing the criminal activity;

(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

(v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.";

in Note 4 by striking "concerted" and inserting "the criminal";

and in Note 5 by inserting after "than most other participants" the following: "in the criminal activity".

REASON FOR AMENDMENT: This amendment is a result of the Commission's study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended. In drug cases, the Commission's study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example, application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another. Moreover, among drug defendants who do receive mitigating role, there are differences from district to district in application rates of the 2-, 3-, and 4-level adjustments. In economic crime cases, the study found that the adjustment was often applied in a limited fashion. For example, the study found that courts often deny mitigating role to otherwise eligible defendants if the defendant was considered "integral" to the successful commission of the offense.

This amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies. Specifically, it addresses a circuit conflict and other case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances. It also provides a non-exhaustive list of factors for the court to consider in determining whether an adjustment applies and, if so, the amount of the adjustment.

Section 3B1.2 provides an adjustment of 2, 3, or 4 levels for a defendant who plays a part in committing the offense that makes him or her "substantially less culpable than the average participant." However, there are differences among the circuits about what determining the "average participant" requires. The Seventh and Ninth Circuits have concluded that the "average participant" means only those persons who actually participated in the criminal activity at issue in the defendant's case, so that the defendant's relative culpability is determined only by reference to his or her co-participants in the case at hand. *See, e.g.*, *United States v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994); *United States v. Cantrell*, 433 F.3d 1269, 1283 (9th Cir. 2006); *United States v. DePriest*, 6 F.3d 1201, 1214 (7th Cir. 1993). The First and Second Circuits have concluded that the "average participant" also includes "the universe of persons participating in similar crimes." *See United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004);

see also United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999). Under this latter approach, courts will ordinarily consider the defendant's culpability relative both to his co-participants and to the typical offender.

The amendment generally adopts the approach of the Seventh and Ninth Circuits, revising the commentary to specify that, when determining mitigating role, the defendant is to be compared with the other participants "in the criminal activity." Focusing the court's attention on the individual defendant and the other participants is more consistent with the other provisions of Chapter Three, Part B. *See, e.g.*, §3B1.2 (the adjustment is based on "the defendant's role in the offense"); §3B1.2, comment. (n.3(C)) (a determination about mitigating role "is heavily dependent upon the facts of the particular case"); Ch. 3, Pt. B, intro. comment. (the determination about mitigating role "is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct)").

Next, the amendment addresses cases in which the defendant was "integral" or "indispensable" to the commission of the offense. Public comment suggested, and a review of case law confirmed, that in some cases a defendant may be denied a mitigating role adjustment solely because he or she was "integral" or "indispensable" to the commission of the offense. *See, e.g.*, *United States v. Skinner*, 690 F.3d 772, 783–84 (6th Cir. 2012) (a "defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensible or critical to the success of the scheme"); *United States v. Panaigua-Verdugo*, 537 F.3d 722, 725 (7th Cir. 2008) (defendant "played an integral part in the transactions and therefore did not deserve a minor participant reduction"); *United States v. Deans*, 590 F.3d 907, 910 (8th Cir. 2010) ("Numerous decisions have upheld the denial of minor role adjustments to defendants who . . . play a critical role"); *United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992) (because defendant was "indispensible to the completion of the criminal activity . . . to debate which one is less culpable than the others . . . is akin to the old argument over which leg of a three-legged stool is the most important leg."). However, a finding that the defendant was essential to the offense does not alter the requirement, expressed in Note 3(A), that the court must assess the defendant's culpability relative to the average participant in the offense. Accordingly, the amendment revises the commentary to emphasize that "the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative" and that such a defendant may receive a mitigating role adjustment, if he or she is otherwise eligible.

The amendment also revises two paragraphs in Note 3(A) that illustrate how mitigating role interacts with relevant conduct principles in §1B1.3. Specifically, the illustrations provide that certain types of defendants are "not precluded from consideration for" a mitigating role adjustment. The amendment revises these paragraphs to state that these types of defendants "may receive" a mitigating role adjustment. The Commission determined that the double-negative tone ("not precluded") may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.

Finally, the amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The factors direct the court to consider the degree to which the defendant understood the scope and structure of the criminal activity, participated in planning or organizing the criminal activity, and exercised decision-making authority, as well as the acts the defendant performed and the degree to which he or she stood to benefit from the criminal activity. The Commission was persuaded by public comment and a detailed review of cases involving low-level offenders, particularly in fraud cases, that providing a list of factors will give the courts a common framework for determining whether to apply a mitigating role adjustment (and, if so, the amount of the adjustment) and will help promote consistency.

The amendment further provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 795

AMENDMENT: The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 4(B) by striking "not counted as a single sentence" and inserting "not treated as a single sentence".

Section 4A1.1(e) is amended by striking "such sentence was counted as a single sentence" and inserting "such sentence was treated as a single sentence".

The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 5 by striking "are counted as a single sentence" and inserting "are treated as a single sentence"; and by striking "are counted as a single prior sentence" and inserting "are treated as a single prior sentence".

Section 4A1.2(a)(2) is amended by striking "those sentences are counted separately or as a single sentence" and inserting "those sentences are counted separately or treated as a single sentence"; by striking "Count any prior sentence" and inserting "Treat any prior sentence"; and by striking "if prior sentences are counted as a single sentence" and inserting "if prior sentences are treated as a single sentence".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 3 by redesignating Note 3 as Note 3(B), and by inserting at the beginning the following:

"*Application of 'Single Sentence' Rule (Subsection (a)(2))*.—

(A) *Predicate Offenses*.—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted "separately" from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

> Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.";

and in Note 3(B) (as so redesignated) by striking "Counting multiple prior sentences as a single sentence" and inserting "Treating multiple prior sentences as a single sentence"; and by striking "and the resulting sentences were counted as a single sentence" and inserting "and the resulting sentences were treated as a single sentence".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by striking "the sentences for the two prior convictions will be counted as a single sentence" and inserting "the sentences for the two prior convictions will be treated as a single sentence".

REASON FOR AMENDMENT: This amendment responds to a circuit conflict regarding the meaning of the "single sentence" rule, set forth in subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and its implications for the career offender guideline and other guidelines that provide sentencing enhancements for predicate offenses.

When the defendant's criminal history includes two or more prior sentences that meet certain criteria specified in §4A1.2(a)(2), those prior sentences are counted as a "single sentence" rather than separately. Generally, this operates to reduce the cumulative impact of prior sentences in determining a defendant's criminal history score. Courts, however, are divided over whether this "single sentence" rule also causes certain prior convictions that ordinarily would qualify as predicate offenses under the career offender guideline to be disqualified from serving as predicate offenses. *See* §4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3).

In 2010, in *King v. United States*, the Eighth Circuit held that when two or more prior sentences are treated as a single sentence under the guidelines, all the criminal history points attributable to the single sentence are assigned to only one of the prior sentences—specifically, the one that was the longest. *King*, 595 F.3d 844, 852 (8th Cir. 2010). Accordingly, only that prior sentence may be considered a predicate offense for purposes of the career offender guideline. *Id*. at 849, 852.

In 2014, in *United States v. Williams*, a panel of the Sixth Circuit considered and rejected *King*, because it permitted the defendant to "evade career offender status because he committed *more* crimes." *Williams*, 753 F.3d 626, 639 (6th Cir. 2014) (emphasis in original). *See also United States v. Cornog*, 945 F.2d 1504, 1506 n.3 (11th Cir. 1991) ("It would be illogical . . . to ignore a conviction for a violent felony just because it happened to be coupled with a nonviolent felony conviction having a longer sentence.").

After the *Williams* decision, a different panel of the Eighth Circuit agreed with the Sixth Circuit's analysis but was not in a position to overrule the earlier panel's decision in *King*. *See Donnell v. United States*, 765 F.3d 817, 820 (8th Cir. 2014). The Eighth Circuit has applied the analysis from *King* to a case involving the firearms guideline and to a case in which the prior sentences were consecutive rather than concurrent. *See, e.g.*, *Pierce v. United States*, 686 F.3d 529, 533 n.3 (8th Cir. 2012) (firearms); *United States v. Parker*, 762 F.3d 801, 808 (8th Cir. 2014) (consecutive sentences). This issue has also been addressed by other courts, some which have followed the Sixth Circuit's approach in *Williams*. *See, e.g.*, *United States v. Carr*, No. 1:06-cr-275-TCB (N.D. Ga. Sept. 11, 2013); *United States v. Agurs*, No. 12-100 (W.D. Pa., July 28, 2014). Other decisions have been consistent with the Eighth Circuit's approach in *King*. *See, e.g.*, *United States v. Santiago*, 387 F. App'x 223 (3d Cir. 2010); *United States v. McQueen*, No. 2:14-CR-031-JLQ (E.D. Wash., July 28, 2014).

The amendment generally follows the Sixth Circuit's approach in *Williams*. It amends the commentary to §4A1.2 to provide that, for purposes of determining predicate offenses, a prior sentence included in a single sentence should be treated as if it received criminal history points if it independently would have received criminal history points. It also provides examples, including an example to illustrate the potential impact of the applicable time periods prescribed in §4A1.2(e). Finally, §§4A1.1 (Criminal History Category) and 4A1.2 are revised stylistically so that sentences "counted" as a single sentence are referred to instead as sentences "treated" as a single sentence.

The amendment ensures that those defendants who have committed more crimes, in addition to a predicate offense, remain subject to enhanced penalties under certain guidelines such as the career offender guideline. Conversely, by clarifying how the single sentence rule interacts with the time limits set forth in §4A1.2(e), the amendment provides that when a prior sentence was so remote in time that it does not independently receive criminal history points, it cannot serve as a predicate offense.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 796

AMENDMENT: The Commentary to §1B1.11 captioned "Background" is amended by striking "144 S. Ct." and inserting "133 S. Ct.".

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by striking "41 U.S.C. §§ 53, 54" and inserting "41 U.S.C. §§ 8702, 8707".

The Commentary to §2B4.1 captioned "Background" is amended by striking "41 U.S.C. §§ 51, 53–54" and inserting "41 U.S.C. §§ 8702, 8707".

The Commentary to §2C1.8 captioned "Statutory Provisions" is amended by striking "2 U.S.C." and all that follows through "441k;" and after "18 U.S.C. § 607" inserting "; 52 U.S.C. §§ 30109(d), 30114, 30116, 30117, 30118, 30119, 30120, 30121, 30122, 30123, 30124(a), 30125, 30126"; and by striking "Statutory Index (Appendix A)" and inserting "Appendix A (Statutory Index)".

The Commentary to §2C1.8 captioned "Application Notes" is amended in Note 1 by striking "2 U.S.C. § 441e(b)" and inserting "52 U.S.C. § 30121(b)"; by striking "2 U.S.C. § 431 et seq" and inserting "52 U.S.C. § 30101 *et seq*."; and by striking "(2 U.S.C. § 431(8) and (9))" and inserting "(52 U.S.C. § 30101(8) and (9))".

Section 2D1.11(e)(7) is amended in the line referenced to Norpseudoephedrine by striking "400" and inserting "400 G".

The Commentary to §2H2.1 captioned "Statutory Provisions" is amended by striking "42 U.S.C. §§ 1973i, 1973j(a), (b)" and inserting "52 U.S.C. §§ 10307, 10308(a), (b)".

The Commentary to §2H4.2 captioned "Application Notes" is amended in Note 2 by striking "*et. seq*." and inserting "*et seq*.".

The Commentary to §2M3.9 is amended by striking "§ 421" each place such term appears and inserting "§ 3121"; and by striking "§ 421(d)" and inserting "§ 3121(d)".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended by striking the heading as follows:

" *Illustrations of the Operation of the Multiple-Count Rules*",

and inserting the following new heading:

" *Concluding Commentary to Part D of Chapter Three*
Illustrations of the Operation of the Multiple-Count Rules";

in Example 1 by striking "convicted on" and inserting "convicted of"; and by striking "$12,000" and inserting "$21,000";

in Example 2 by striking "Defendant C" and inserting "Defendant B"; by striking "convicted on" and inserting "convicted of"; and by striking "offense level for bribery (22)" and inserting "offense level for bribery (20)";

and in Example 3 by striking "Defendant D" and inserting "Defendant C"; by striking "$27,000", "$12,000", "$15,000", and "$20,000" and inserting "$1,000" in each place such terms appear; by striking "$74,000" and inserting "$4,000"; and by striking "16" both places such term appears and inserting "9".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 5 by striking "2 U.S.C. § 437g(d)(1)(D)" and inserting "52 U.S.C. § 30109(d)(1)(D)"; and by striking "2 U.S.C. § 441f" and inserting "52 U.S.C. § 30122".

Appendix A (Statutory Index) is amended by striking the following line references:

"2 U.S.C. § 437g(d)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8
2 U.S.C. § 441d	2C1.8
2 U.S.C. § 441e	2C1.8
2 U.S.C. § 441f	2C1.8
2 U.S.C. § 441g	2C1.8
2 U.S.C. § 441h(a)	2C1.8
2 U.S.C. § 441i	2C1.8
2 U.S.C. § 441k	2C1.8",

and inserting at the end the following new line references:

"52 U.S.C. § 30109(d)	2C1.8
52 U.S.C. § 30114	2C1.8
52 U.S.C. § 30116	2C1.8
52 U.S.C. § 30117	2C1.8
52 U.S.C. § 30118	2C1.8
52 U.S.C. § 30119	2C1.8
52 U.S.C. § 30120	2C1.8
52 U.S.C. § 30121	2C1.8
52 U.S.C. § 30122	2C1.8
52 U.S.C. § 30123	2C1.8
52 U.S.C. § 30124(a)	2C1.8
52 U.S.C. § 30125	2C1.8
52 U.S.C. § 30126	2C1.8";

by striking the following line references:

"42 U.S.C. § 1973i(c)	2H2.1
42 U.S.C. § 1973i(d)	2H2.1
42 U.S.C. § 1973i(e)	2H2.1
42 U.S.C. § 1973j(a)	2H2.1
42 U.S.C. § 1973j(b)	2H2.1
42 U.S.C. § 1973j(c)	2X1.1
42 U.S.C. § 1973aa	2H2.1
42 U.S.C. § 1973aa-1	2H2.1
42 U.S.C. § 1973aa-1a	2H2.1
42 U.S.C. § 1973aa-3	2H2.1
42 U.S.C. § 1973bb	2H2.1
42 U.S.C. § 1973gg-10	2H2.1",

and inserting after the line referenced to 50 U.S.C. App. § 2410 the following new line references:

"52 U.S.C. § 10307(c)	2H2.1
52 U.S.C. § 10307(d)	2H2.1
52 U.S.C. § 10307(e)	2H2.1
52 U.S.C. § 10308(a)	2H2.1
52 U.S.C. § 10308(b)	2H2.1
52 U.S.C. § 10308(c)	2X1.1
52 U.S.C. § 10501	2H2.1
52 U.S.C. § 10502	2H2.1
52 U.S.C. § 10503	2H2.1
52 U.S.C. § 10505	2H2.1
52 U.S.C. § 10701	2H2.1
52 U.S.C. § 20511	2H2.1";

and by striking the line referenced to 50 U.S.C. § 421 and inserting after the line referenced to 50 U.S.C. § 1705 the following new line reference:

"50 U.S.C. § 3121	2M3.9".

REASON FOR AMENDMENT: This amendment makes certain technical changes to the *Guidelines Manual*.

First, the amendment sets forth technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective February 2014, the Office of the Law Revision Counsel transferred provisions relating to voting and elections from titles 2 and 42 to a new title 52. It also transferred provisions of the National Security Act of 1947 from one place to another in title 50. To reflect the new section numbers of the reclassified provisions, changes are made to—

(1) the Commentary to §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property);

(2) the Commentary to §2H2.1 (Obstructing an Election or Registration);

(3) the Commentary to §2M3.9 (Disclosure of Information Identifying a Covert Agent);

(4) Application Note 5 to §5E1.2 (Fines for Individual Defendants); and

(5) Appendix A (Statutory Index).

Second, it makes stylistic and technical changes to the Commentary following §3D1.5 (Determining the Total Punishment) captioned "Illustrations of the Operation of the Multiple-Count Rules" to better reflect its purpose as a concluding commentary to Part D of Chapter Three.

Finally, it makes clerical changes to—

(1) the Background Commentary to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), to correct a typographical error in a U.S. Reports citation;

(2) the Commentary to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), to correct certain United States Code citations to correspond with their respective references in Appendix A that were revised by Amendment 769 (effective November 1, 2012);

(3) subsection (e)(7) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to add a missing measurement unit to the line referencing Norpseudoephedrine; and

(4) Application Note 2 to §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), to correct a typographical error in an abbreviation.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 797

AMENDMENT: The Commentary to §1B1.3 captioned "Application Notes", as amended by Amendment 790, is further amended in Note 1 by inserting as the heading the following: "*Sentencing Accountability and Criminal Liability*.—".

The Commentary to §1B1.3 captioned "Application Notes", as amended by Amendment 790, is further amended by renumbering Notes 5 through 12 according to the following table:

Before Amendment	*After Amendment*
5	5(A)
11	5(B)
11(A)	5(B)(i)
11(B)	5(B)(ii)
10	5(C)
6	6(A)
7	6(B)
8	7

9	8
12	9

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §1B1.3 captioned "Application Notes", as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

Note	*Heading to Be Inserted at the Beginning*
5	*Application of Subsection (a)(2).*—
5(A)	*Relationship to Grouping of Multiple Counts.*—
5(B)	*"Same Course of Conduct or Common Scheme or Plan".*—
5(C)	*Conduct Associated with a Prior Sentence.*—
6	*Application of Subsection (a)(3).*—
6(A)	*Definition of "Harm".*—
6(B)	*Risk or Danger of Harm.*—
7	*Factors Requiring Conviction under a Specific Statute.*—
8	*Partially Completed Offense.*—
9	*Solicitation, Misprision, or Accessory After the Fact.*—

The Commentary to §2D1.1 captioned "Application Notes", is amended in Note 8(D), in the heading relating to Date Rape Drugs (except flunitrazipam, GHB, or ketamine), by striking "flunitrazipam" and inserting "flunitrazepam".

The Commentary to §2K2.1 captioned "Application Notes", as amended by Amendment 790, is further amended in Note 14(E) by striking "Application Note 11" both places such term appears and inserting "Application Note 5(B)".

The Commentary to §2X3.1 captioned "Application Notes", as amended by Amendment 790, is further amended in Note 1 by striking "Application Note 12" and inserting "Application Note 9".

The Commentary to §2X4.1 captioned "Application Notes", as amended by Amendment 790, is further amended in Note 1 by striking "Application Note 12" and inserting "Application Note 9".

The Commentary to §8C2.8 captioned "Application Notes" is amended in Note 7 by striking the period at the end and inserting ").".

REASON FOR AMENDMENT: This amendment makes certain technical and conforming changes to commentary in the *Guidelines Manual*.

First, the amendment reorganizes the commentary to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), so that the order of the application notes better reflects the order of the guideline provisions to which they relate. The Commission had previously reorganized notes 1 and 2 into notes 1 through 4, also redesignating notes 3 through 10 as notes 5 through 12, in a recently promulgated amendment. *See* Amendment 790. This amendment further rearranges the commentary, specifically notes 5 through 12. The following table shows the renumbering of notes 5 through 12 that would result from the amendment in comparison to the current *Guidelines Manual* and the recently promulgated amendment to §1B1.3.

2014 Guidelines Manual	*Recently Promulgated Amendment*	*Technical Amendment*
3	5	5(A)
9	11	5(B)
8	10	5(C)
4	6	6(A)
5	7	6(B)
6	8	7
7	9	8
10	12	9

The amendment also makes stylistic changes to the commentary to §1B1.3, such as adding headings to certain application notes. To reflect the renumbering of application notes in §1B1.3, conforming changes are also made to the commentary to §§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2X3.1 (Accessory After the Fact), and 2X4.1 (Misprision of Felony).

Second, the amendment makes clerical changes to correct typographical errors in Application Note 8(D) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and Application Note 7 to §8C2.8 (Determining the Fine Within the Range (Policy Statement)).

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 798

AMENDMENT: The Commentary to §4B1.1 captioned "Application Notes" is amended by inserting at the beginning of Note 1 the following new heading: "*Definitions*.—"; by inserting at the beginning of Note 2 the following new heading: "*'Offense Statutory Maximum'*.—"; and by inserting at the end the following new Note 4:

"4. *Departure Provision for State Misdemeanors*.—In a case in which one or both of the defendant's 'two prior felony convictions' is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of

the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).".

Section 4B1.2(a) is amended by striking paragraph (2) as follows:

"(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.",

and inserting the following:

"(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).".

The Commentary to §4B1.2 captioned "Application Notes" is amended—

in Note 1 by inserting "*Definitions*.—" as a heading before the beginning of the note; by striking the second and third undesignated paragraphs as follows:

"'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as 'crimes of violence' if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

'Crime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.",

and inserting the following new paragraphs:

"'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.";

and by striking the fifth undesignated paragraph as follows:

"Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence'.";

in Note 2, at the beginning of the note, by inserting the following new heading: "*Offense of Conviction as Focus of Inquiry*.—";

in Note 3, at the beginning of the note, by inserting the following new heading: "*Applicability of §4A1.2*.—";

and by inserting at the end the following new Note 4:

"4. *Upward Departure for Burglary Involving Violence*.—There may be cases in which a burglary involves violence, but does not qualify as a 'crime of violence' as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a 'crime of violence.' In such a case, an upward departure may be appropriate.".

REASON FOR AMENDMENT: This amendment is a result of the Commission's multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (*e.g.*, "crime of violence," "aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense") and the impact of such definitions on the relevant statutory and guideline provisions (*e.g.*, career offender, illegal reentry, and armed career criminal). As part of this study, the Commission considered feedback from the field, including conducting a roundtable discussion on these topics and considering the varying case law interpreting these statutory and guideline definitions. In particular, the Commission has received extensive comment, and is aware of numerous court opinions, expressing a view that the definition of "crime of violence" is complex and unclear. The amendment is informed by this public comment and case law, as well as the Supreme Court's recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), regarding the statutory definition of "violent felony" in 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or "ACCA"). While not addressing the guidelines, that decision has given rise to significant litigation regarding the guideline definition of "crime of violence." Finally, the Commission analyzed a range of sentencing data, including a study of the sentences relative to the guidelines for the career offender guidelines. *See* U.S. Sentencing Comm'n, *Quick Facts: Career Offenders* (Nov. 2015) (highlighting the decreasing rate of within range guideline sentences (27.5% in fiscal year 2014), which has been coupled with increasing rates of government (45.6%) and non-government sponsored below range sentences (25.9%)).

The amendment makes several changes to the definition of "crime of violence" at §4B1.2 (Definitions of Terms Used in Section 4B1.1), which, prior to this amendment, was defined as any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that

- has as an element the use, attempted use, or threatened use of physical force against the person of another ("force clause" or "elements clause"), *see* §4B1.2(a)(1);
- is murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or involves the use of explosives ("enumerated offenses"), *see* §4B1.2(a)(2) and comment. (n.1); or
- otherwise involves conduct that presents a serious potential risk of physical injury to another ("residual clause"), *see* §4B1.2(a)(2).

The "crime of violence" definition at §4B1.2 is used to trigger increased sentences under several provisions in the *Guidelines Manual*, the most significant of which is §4B1.1 (Career Offender). *See also* §§2K1.3, 2K2.1, 2S1.1, 4A1.1(e), 7B1.1. The career offender guideline implements a directive to the Commission set forth at 28 U.S.C. § 994(h), which in turn identifies offenders

for whom the guidelines must provide increased punishment. Tracking the criteria set forth in section 994(h), the Commission implemented the directive by identifying a defendant as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. Where these criteria are met, the directive at section 994(h), and therefore §4B1.1, provides for significantly higher sentences under the guidelines, such that the guideline range is "at or near the maximum [term of imprisonment] authorized." Commission data shows that application of §4B1.1 resulted in an increased final offense level, an increased Criminal History Category, or both for 91.3 percent of defendants sentenced under the career offender guideline in fiscal year 2014. *See* U.S. Sentencing Comm'n, *Quick Facts: Career Offenders* (Nov. 2015) (46.3% of career offenders received an increase in both final offense level (from an average of 23 levels to 31 levels) and criminal history category (from an average of category IV to category VI); 32.6% had just a higher final offense level (from an average of 23 levels to 30 levels); and 12.4% had just a higher Criminal History Category (from an average of category IV to category VI)).

Residual Clause

First, the amendment deletes the "residual clause" at §4B1.2(a)(2). Prior to the amendment, the term "crime of violence" in §4B1.2 included any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." In *Johnson*, the Supreme Court considered an identical residual clause relating to the statutory definition of "violent felony" in the Armed Career Criminal Act. The Court held that using the "residual clause" to classify an offense as a "violent felony" violated due process because the clause was unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2563. While the Supreme Court in *Johnson* did not consider or address the sentencing guidelines, significant litigation has ensued regarding whether the Supreme Court's holding in *Johnson* should also apply to the residual clause in §4B1.2. *Compare United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015) (rejecting the argument that the residual clause in §4B1.2 is unconstitutionally vague in light of *Johnson*) and *United States v. Wilson*, 622 F. App'x 393, 405 n.51 (5th Cir. 2015) (in considering the applicability of *Johnson*, noting "[o]ur case law indicates that a defendant cannot bring a vagueness challenge against a Sentencing Guideline"), *with United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015) (finding that previous circuit precedent holding that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after *Johnson*); *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015) (holding that that the residual clause of §4B1.2(a)(2) is void for vagueness); *United States v. Harbin*, 610 F. App'x 562 (6th Cir. 2015) (finding that defendant is entitled to the same relief as offenders sentenced under the residual clause of the ACCA); and *United States v. Townsend*, 638 F. App'x 172, 177–78 (3d Cir. 2015) (remanding for resentencing in light of the government's concession that, pursuant to *Johnson*, the defendant should not have been sentenced as a career offender).

The Commission determined that the residual clause at §4B1.2 implicates many of the same concerns cited by the Supreme Court in *Johnson*, and, as a matter of policy, amends §4B1.2(a)(2) to strike the clause. Removing the residual clause has the advantage of alleviating the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants. Furthermore, removing the clause will alleviate some of the ongoing litigation and uncertainty resulting from the *Johnson* decision.

List of Enumerated Offenses

With the deletion of the residual clause under subsection (a)(2), there are two remaining components of the "crime of violence" definition – the "elements clause" and the "enumerated offenses clause." The "elements clause" set forth in subsection (a)(1) remains unchanged by the

amendment. Thus, any offense under federal or state law, punishable by imprisonment for a term exceeding one year, qualifies as a "crime of violence" if it has as an element the use, or attempted use, or threatened use of physical force against the person of another. Importantly, such an offense may, but need not, be specifically enumerated in subsection (a)(2) to qualify as a crime of violence.

The "enumerated offense clause" identifies specific offenses that qualify as crimes of violence. In applying this clause, courts compare the elements of the predicate offense of conviction with the elements of the enumerated offense in its "generic, contemporary definition." As has always been the case, such offenses qualify as crimes of violence regardless of whether the offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another. While most of the offenses on the enumerated list under §4B1.2(a)(2) remain the same, the amendment does revise the list in a number of ways to focus on the most dangerous repeat offenders. The revised list is based on the Commission's consideration of public hearing testimony, a review of extensive public comment, and an examination of sentencing data relating to the risk of violence in these offenses and the recidivism rates of career offenders. Additionally, the Commission's revisions to the enumerated list also consider and reflect the fact that offenses not specifically enumerated will continue to qualify as a crime of violence if they satisfy the elements clause.

As amended, the enumerated offenses include murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c). For easier application, all enumerated offenses are now included in the guideline at §4B1.2; prior to the amendment, the list was set forth in both §4B1.2(a)(2) and the commentary at Application Note 1.

Manslaughter, which is currently enumerated in Application Note 1, is revised to include only voluntary manslaughter. While Commission analysis indicates that it is rare for involuntary manslaughter to be identified as a predicate for the career offender guideline, this change provides that only voluntary manslaughter should be considered. This is also consistent with the fact that involuntary manslaughter generally would not have qualified as a crime of violence under the "residual clause." *See Begay v. United States*, 553 U.S. 137 (2008) (limiting crimes covered by the ACCA residual clause to those roughly similar in kind and degree of risk posed as the enumerated offenses, which typically involve "purposeful, violent, and aggressive conduct").

The amendment deletes "burglary of a dwelling" from the list of enumerated offenses. In implementing this change, the Commission considered that (1) burglary offenses rarely result in physical violence, (2) "burglary of a dwelling" is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for a burglary offense after release. The Commission considered several studies and analyses in reaching these conclusions.

First, several recent studies demonstrate that most burglaries do not involve physical violence. *See* Bureau of Justice Statistics, *National Crime Victimization Survey, Victimization During Household Burglary* (Sept. 2010) (finding that a household member experienced some form of violent victimization in 7% of all household burglaries from 2003 to 2007); Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998–2007*, at 29 (2015), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf (concluding that 7.6% of burglaries between 1998 and 2007 resulted in actual violence or threats of violence, while actual physical injury was reported in only 2.7% of all burglaries); *see also* United States Department of Justice, Federal Bureau of Investigation, *Uniform Crime Report, Crime in the United*

States (2014) (classifying burglary as a "property crime" rather than a "violent crime"). Second, based upon an analysis of offenders sentenced in fiscal year 2014, the Commission estimates that removing "burglary of a dwelling" as an enumerated offense in §4B1.2(a)(2) will reduce the overall proportion of offenders who qualify as a career offender by less than three percentage points. The Commission further estimates that removing the enumerated offense would result in only about five percent of offenders sentenced under USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) receiving a lower base offense level than would currently apply. Finally, a Commission analysis of recidivism rates for career offenders released during calendar years 2004 through 2006 indicates that about five percent of such offenders were rearrested for a burglary offense during the eight years after their release.

In reaching this conclusion, the Commission also considered that courts have struggled with identifying a uniform contemporary, generic definition of "burglary of dwelling." In particular, circuits have disagreed regarding whether the requirement in *Taylor v. United States*, 495 U.S. 575, 598 (1990), that the burglary be of a "building or other structure" applies in addition to the guidelines' requirement that the burglary be of a "dwelling." *Compare United States v. Henriquez*, 757 F.3d 144, 148–49 (4th Cir. 2014); *United States v. McFalls*, 592 F.3d 707 (6th Cir. 2010); *United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003) *with United States v. Ramirez*, 708 F.3d 295, 301 (1st Cir. 2013); *United States v. Murillo-Lopez*, 444 F.3d 337, 340 (5th Cir. 2006); *United States v. Rivera-Oros*, 590 F.3d 1123 (10th Cir. 2009); *United States v. McClenton*, 53 F.3d 584 (3d Cir. 1995); *United States v. Graham*, 982 F.2d 315 (8th Cir. 1992).

Although "burglary of a dwelling" is deleted as an enumerated offense, the amendment adds an upward departure provision to §4B1.2 to address the unusual case in which the instant offense or a prior felony conviction was any burglary offense involving violence that did not otherwise qualify as a "crime of violence." This departure provision allows courts to consider all burglary offenses, as opposed to just burglaries of a dwelling, and reflects the Commission's determination that courts should consider an upward departure where a defendant would have received a higher offense level, higher Criminal History Category, or both (*e.g.*, where the defendant would have been a career offender) if such burglary had qualified as a "crime of violence."

Finally, the amendment adds offenses that involve the "use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or an explosive material as defined in 18 U.S.C. § 841(c)" to the enumerated list at §4B1.2(a)(2). This addition is consistent with long-standing commentary in §4B1.2 categorically identifying possession of a firearm described in 26 U.S.C. § 5845(a) as a "crime of violence," and therefore maintains the status quo. The Commission continues to believe that possession of these types of weapons (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) inherently presents a serious potential risk of physical injury to another person. Additionally, inclusion as an enumerated offense reflects Congress's determination that such weapons are inherently dangerous and, when possessed unlawfully, serve only violent purposes. *See also* USSG App. C, amend. 674 (effective Nov. 1, 2004) (expanding the definition of "crime of violence" in Application Note 1 to §4B1.2 to include unlawful possession of any firearm described in 26 U.S.C. § 5845(a)).

Enumerated Offense Definitions

The amendment also adds definitions for the enumerated offenses of forcible sex offense and extortion. The amended guideline, however, continues to rely on existing case law for purposes of defining the remaining enumerated offenses. The Commission determined that adding several new definitions could result in new litigation, and that it was instead best not to disturb the case law that has developed over the years.

As amended, "forcible sex offense" includes offenses with an element that consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. Consistent with the definition in §2L1.2 (Unlawfully Entering or Remaining in the United States), this addition reflects the Commission's determination that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute "crimes of violence" under §4B1.2. *See also* USSG App. C, amend. 722 (effective Nov. 1, 2008) (clarifying the scope of the term "forcible sex offense" as that term is used in the definition of "crime of violence" in §2L1.2, Application Note 1(B)(iii)).

The new commentary also provides that the offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c), or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. This addition makes clear that the term "forcible sex offense" in §4B1.2 includes sexual abuse of a minor and statutory rape where certain specified elements are present.

"Extortion" is defined as "obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury." Under case law existing at the time of this amendment, courts generally defined extortion as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats" based on the Supreme Court's holding in *United States v. Nardello*, 393 U.S. 286, 290 (1969) (defining "extortion" for purposes of the Hobbs Act). Consistent with the Commission's goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrows the generic definition of extortion by limiting the offense to those having an element of force or an element of fear or threats "of physical injury," as opposed to nonviolent threats such as injury to reputation.

Departure Provision at §4B1.1

Finally, the amendment adds a downward departure provision in §4B1.1 for cases in which one or both of the defendant's "two prior felony convictions" is based on an offense that is classified as a misdemeanor at the time of sentencing for the instant federal offense.

An offense (whether a "crime of violence" or a "controlled substance offense") is deemed to be a "felony" for purposes of the career offender guideline if it is punishable by imprisonment for a term exceeding one year. This definition captures some state offenses that are punishable by more than a year of imprisonment, but are in fact classified by the state as misdemeanors. Such statutes are found, for example, in Colorado, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont.

The Commission determined that the application of the career offender guideline where one or both of the defendant's "two prior felony convictions" is an offense that is classified as a misdemeanor may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. While recognizing the importance of maintaining a uniform and consistent definition of the term "felony" in the guidelines, the Commission determined that it is also appropriate for a court to consider the seriousness of the prior offenses (as reflected in the classification assigned by the convicting jurisdiction) in deciding whether the significant increases under the career offender guideline are appropriate. Such consideration is consistent with the structure used by Congress in the context of the Armed Career Criminal Act. *See* 18 U.S.C. § 921(a)(20) (providing, for purposes of Chapter 44 of Title 18, that "crime punishable by imprisonment for a term exceeding one year" does not include a State offense classified as a misdemeanor and

punishable by two years or less). It is also consistent with the court's obligation to account for the "nature and circumstances of the offense and the history and characteristics of the defendant." *See* 18 U.S.C. § 3553(a)(1).

Effective Date: The effective date of this amendment is August 1, 2016.

AMENDMENT 799

AMENDMENT: Section 1B1.13 is amended in the heading by striking "as a Result of Motion by Director of Bureau of Prisons" and inserting "Under 18 U.S.C. § 3582(c)(1)(A)".

The Commentary to §1B1.13 captioned "Application Notes" is amended in Note 1 by striking the heading as follows: "*Application of Subdivision (1)(A).*—"; by striking Note 1(A) as follows:

"(A) *Extraordinary and Compelling Reasons*.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances:

(i) The defendant is suffering from a terminal illness.

(ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

(iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.

(iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).";

by redesignating Notes 1(B) and 2 as Notes 3 and 5, respectively, and inserting before Note 3 (as so redesignated) the following new Notes 1 and 2:

"1. *Extraordinary and Compelling Reasons*.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) *Medical Condition of the Defendant*.—

(i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) *Age of the Defendant*.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) *Family Circumstances.*—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) *Other Reasons*.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

2. *Foreseeability of Extraordinary and Compelling Reasons*.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.";

in Note 3 (as so redesignated) by striking "subdivision (1)(A)" and inserting "this policy statement";

and by inserting after Note 3 (as so redesignated) the following new Note 4:

"4. *Motion by the Director of the Bureau of Prisons*.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.".

The Commentary to §1B1.13 captioned "Background" is amended by striking "This policy statement implements 28 U.S.C. § 994(t)." and inserting the following:

"The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) to 'describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.' This policy statement implements 28 U.S.C. § 994(a)(2) and (t).".

REASON FOR AMENDMENT: This amendment is a result of the Commission's review of the policy statement pertaining to "compassionate release" at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The amendment broadens certain eligibility criteria and encourages the Director of the Bureau of Prisons to file a motion for compassionate release when "extraordinary and compelling reasons" exist.

Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant if "extraordinary and compelling reasons" warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1)(A); *see also* 28 U.S.C. §§ 992(a)(2) (stating that the Commission shall promulgate general policy statements regarding "the sentence modification provisions set forth in section[] . . . 3582(c) of title 18"); and 994(t) (stating that the Commission, in promulgating any such policy statements, "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples"). In turn, the Commission promulgated the policy statement at §1B1.13, which defines "extraordinary and compelling reasons" for compassionate release.

The Bureau of Prisons has developed its own criteria for the implementation of section 3582(c)(1)(A). *See* U.S. Department of Justice, Federal Bureau of Prisons, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Program Statement 5050.49, CN-1). Under its program statement, a sentence reduction may be based on the defendant's medical circumstances (*e.g.*, a terminal or debilitating medical condition; *see* 5050.49(3)(a)–(b)) or on certain non-medical circumstances (*e.g.*, an elderly defendant, the death or incapacitation of the family member caregiver of an inmate's minor child, or the incapacitation of the defendant's spouse or registered partner when the inmate would be the only available caregiver; *see* 5050.49(4),(5),(6)).

The Commission has conducted an in-depth review of this topic, including consideration of Bureau of Prisons data documenting lengthy review of compassionate release applications and low approval rates, as well as two reports issued by the Department of Justice Office of the Inspector General that are critical of the Bureau of Prisons' implementation of its compassionate release program. *See* U.S. Department of Justice, Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program, I-2013-006 (April 2013); U.S. Department of Justice, Office of the Inspector General, The Impact of the Aging Inmate Population on the Federal Bureau of Prisons, E-15-05 (May 2015). In February 2016, the Commission held a public hearing on compassionate release and received testimony from witnesses and experts about the need to broaden the criteria for eligibility, to add guidance to the medical criteria, and to remove other administrative hurdles that limit the availability of compassionate release for otherwise eligible defendants.

The amendment revises §1B1.13 in several ways. First, the amendment broadens the Commission's guidance on what should be considered "extraordinary and compelling reasons" for compassionate release. It provides four categories of criteria: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons."

The "Medical Condition of the Defendant" category has two prongs: one for defendants with terminal illness, and one that applies to defendants with a debilitating condition. For the first subcategory, the amendment clarifies that terminal illness means "a serious and advanced illness with an end of life trajectory," and it explicitly states that a "specific prognosis of life expectancy (*i.e.* a probability of death within a specific time period) is not required." These changes respond to testimony and public comment on the challenges associated with diagnosing terminal illness. In particular, while an end-of-life trajectory may be determined by medical professionals with some certainty, it is extremely difficult to determine death within a specific time period. For that reason, the Commission concluded that requiring a specified prognosis (such as the 18-month prognosis in the Bureau of Prisons' program statement) is unnecessarily restrictive both in terms of the administrative review and the scope of eligibility for compassionate release applications. For added clarity, the amendment also provides a non-exhaustive list of illnesses that may qualify as a terminal illness.

For the non-terminal medical category, the amendment provides three broad criteria to include defendants who are (i) suffering from a serious condition, (ii) suffering from a serious functional or cognitive impairment, or (iii) experiencing deteriorating health because of the aging process, for whom the medical condition substantially diminishes the defendant's ability to provide self-care within a correctional facility and from which he or she is not expected to recover. The primary change to this category is the addition of prong (II) regarding a serious functional or cognitive impairment. This additional prong is intended to include a wide variety of permanent, serious impairments and disabilities, whether functional or cognitive, that make life in prison overly difficult for certain inmates.

The amendment also adds an age-based category ("Age of the Defendant") for eligibility in §1B1.13. This new category would apply if the defendant (i) is at least 65 years old, (ii) is experiencing a serious deterioration in health because of the aging process, and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment (whichever is less). The age-based category resembles criteria in the Bureau of Prisons' program statement, but adds a limitation that the defendant must be experiencing seriously deteriorating health because of the aging process. The amendment also clarifies that the time-served aspect should be applied with regard to "whichever is less," an important distinction from the Bureau of Prisons' criteria, which has limited application to only those elderly offenders serving significant terms of imprisonment. The Commission determined that 65 years should be the age for eligibility under the age-based category after considering the Commission's recidivism research, which finds that inmates aged 65 years and older exhibit a very low rate of recidivism (13.3%) as compared to other age groups. The Commission expects that the broadening of the medical conditions categories, cited above, will lead to increased eligibility for inmates who suffer from certain conditions or impairments, and who experience a diminished ability to provide self-care in prison, regardless of their age.

The amendment also includes a "Family Circumstances" category for eligibility that applies to (i) the death or incapacitation of the caregiver of the defendant's minor child, or (ii) the incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver. The amendment deletes the requirement under prong (i) regarding the death or incapacitation of the "defendant's only family member" caregiver, given the possibility that the existing caregiver may not be of family relation. The Commission also added

prong (ii), which makes this category of criteria consistent with similar considerations in the Bureau of Prisons' program statement.

Second, the amendment updates the Commentary in §1B1.13 to provide that an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction. The Commission heard from stakeholders and medical experts that the corresponding limitation in the Bureau of Prisons' program statement ignores the often precipitous decline in health or circumstances that can occur after imprisonment. The Commission determined that potential foreseeability at the time of sentencing should not automatically preclude the defendant's eligibility for early release under §1B1.13.

Finally, the amendment adds a new application note that encourages the Director of the Bureau of Prisons to file a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" in §1B1.13. The Commission heard testimony and received public comment concerning the inefficiencies that exist within the Bureau of Prisons' administrative review of compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility. While only the Director of the Bureau of Prisons has the statutory authority to file a motion for compassionate release, the Commission finds that "the court is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted (and, if so, the amount of reduction), including the factors set forth 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community." The Commission's policy statement is not legally binding on the Bureau of Prisons and does not confer any rights on the defendant, but the new commentary is intended to encourage the Director of the Bureau of Prisons to exercise his or her authority to file a motion under section 3582(c)(1)(A) when the criteria in this policy statement are met.

The amendment also adds to the Background that the Commission's general policy-making authority at 28 U.S.C. § 994(a)(2) serves as an additional basis for this and other guidance set forth in §1B1.13, and the amendment changes the title of the policy statement. These changes are clerical.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 800

AMENDMENT: Section 2E3.1 is amended in subsection (a) by striking subsection (a)(2) as follows:

"(2) 10, if the offense involved an animal fighting venture; or";

by redesignating subsections (a)(1) and (a)(3) as subsections (a)(2) and (a)(4), respectively; in subsection (a)(2) (as so redesignated) by striking "operation; or" and inserting "operation;"; by inserting before subsection (a)(2) (as so redesignated) the following new subsection (a)(1):

"(1) 16, if the offense involved an animal fighting venture, except as provided in subdivision (3) below;";

and by inserting before subsection (a)(4) (as so redesignated) the following new subsection (a)(3):

"(3) 10, if the defendant was convicted under 7 U.S.C. § 2156(a)(2)(B); or".

The Commentary to §2E3.1 captioned "Statutory Provisions" is amended by inserting after "7 U.S.C. § 2156" the following: "(felony provisions only)".

The Commentary to §2E3.1 captioned "Application Notes" is amended in Note 1 by striking ": 'Animal" and inserting ", 'animal";

and in Note 2 by striking "If the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted.", and inserting the following:

"The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal-beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).".

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. § 2156 by inserting after "§ 2156" the following: "(felony provisions only)".

REASON FOR AMENDMENT: This amendment responds to two legislative changes to the Animal Welfare Act (the "Act") (codified at 7 U.S.C. § 2156) made by Congress in 2008 and 2014. First, in 2008, Congress amended the Act to increase the maximum term of imprisonment for offenses involving an animal fighting venture from three years to five years. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234, § 14207(b), 122 Stat. 1461, 1462 (May 22, 2008). Second, in 2014, Congress again amended the Act to create two new offenses—the offense of attending an animal fight and the offense of causing an individual under the age of 16 to attend an animal fight, with respective statutory maximum terms of imprisonment of one and three years. *See* Agricultural Act of 2014, Pub. L. 113–79, § 12308, 128 Stat. 990, 990 (Feb. 7, 2014).

The amendment makes several changes to §2E3.1 (Gambling Offenses, Animal Fighting Offenses) to account for these legislative actions. The amendment is informed by extensive public comment, recent case law, and analysis of Commission data regarding the current penalties for animal fighting offenses.

Higher Penalties for Animal Fighting Venture Offenses

First, the amendment increases the base offense level for offenses involving an animal fighting venture from 10 to 16. This change reflects the increase in the statutory maximum penalty from three to five years for offenses prohibited under 7 U.S.C. § 2156(a)–(e). *See* 18 U.S.C. § 49 (containing the criminal penalties for violations of section 2156). The Commission also determined that the increased base offense level better accounts for the cruelty and violence that is characteristic of these crimes, as reflected in the extensive public comment and testimony noting that a defeated animal is often severely injured or killed during or after a fight and that the animals used in these crimes are commonly exposed to inhumane living conditions or other forms of neglect.

In making this change, the Commission was also informed by data evidencing a high percentage of above range sentences in these cases. During fiscal years 2011 through 2014, almost one-third (31.0%) of the seventy-four offenders who received the base offense level of 10 under §2E3.1 received an above range sentence, compared to a national above range rate of 2.0 percent for all offenders. For those animal fighting offenders sentenced above the range, the average extent of the upward departure was more than twice the length of imprisonment at the high end of the guideline range, resulting in an average sentence of 18 months (and a median sentence of 16 months). Comparably, the amended base offense level will result in a guideline range of 12 to 18 months for the typical animal fighting venture offender who is in Criminal History Category I and receives a three-level reduction for acceptance of responsibility under §3E1.1 (Acceptance of Responsibility). Additionally, for offenders in the higher criminal history categories, the guideline range at base offense level 16 allows for applicable Chapter Three increases while remaining within the statutory maximum.

New Offenses Relating to Attending an Animal Fighting Venture

The amendment also establishes a base offense level of 10 in §2E3.1 if the defendant was convicted under section 2156(a)(2)(B) for causing an individual under 16 to attend an animal fighting venture. The Commission believes this level of punishment best reflects Congress's intent in creating this new crime. A base offense level of 10 for this new offense will result in a guideline range (before acceptance of responsibility) of 6 to 12 months of imprisonment for offenders in Criminal History Category I, while allowing for a guideline range approaching the three-year statutory maximum for offenders in higher criminal history categories. The Commission also noted that assigning a base offense level of 10 is consistent with the policy decision made by the Commission when it assigned a base offense level of 10 to an animal fighting crime in 2008, which, at that time, also had a three-year statutory maximum penalty. *See* USSG App. C, amend. 721 (effective November 1, 2008).

Lastly, the amendment establishes a base offense level of 6 for the new class A misdemeanor of attending an animal fighting venture prohibited by section 2156(a)(2)(A) by including only the felony provisions of 7 U.S.C. § 2156 in the Appendix A reference to §2E3.1. Consistent with other Class A misdemeanor offenses, this base offense level is established through application of §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Departure Provision

The amendment also revises and expands the existing upward departure language in two ways.

First, the amendment clarifies the circumstances in which an upward departure for exceptional cruelty may be warranted. As reflected in the revised departure provision, the base offense levels provided for animal fighting ventures in subsections (a)(1) and (a)(3) reflect the fact that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. The Commission heard testimony that in a typical dog fight, dogs puncture and tear at each other, until one animal is too injured to continue, and during a cock fight, roosters strike each other with their beaks and with sharp blades that have been strapped to their legs, suffering punctured lungs, broken bones, and pierced eyes. Nonetheless, as informed by public comment and testimony, the Commission's study indicates that some animal fighting offenses involve extraordinary cruelty to an animal beyond that which is common to such crimes, such as killing an animal in a way that prolongs the suffering of the animal. The Commission determined that such extraordinary cruelty may fall outside the heartland of conduct encompassed by the base offense level for animal fighting ventures and, therefore, that an upward departure may be warranted in those cases.

Similarly, the amendment expands the existing departure provision to include offenses involving animal fighting on an exceptional scale (such as offenses involving an unusually large number of animals) as another example of conduct that may warrant an upward departure. As with the example of extraordinary cruelty, the Commission determined that the base offense level under the revised guideline may understate the seriousness of the offense in those cases.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 801

AMENDMENT: Section 2G2.1 is amended in subsection (b)(3) by striking "If the offense involved distribution" and inserting "If the defendant knowingly engaged in distribution";

and in subsection (b)(4) by inserting "(A)" before "sadistic or masochistic", and by inserting after "violence" the following: "; or (B) an infant or toddler".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by inserting at the end the following: "For additional statutory provision(s), *see* Appendix A (Statutory Index).".

The Commentary to §2G2.1 captioned "Application Notes" is amended by redesignating Notes 3, 4, 5, and 6 as Notes 5, 6, 7, and 8, respectively, and by inserting after Note 2 the following new Notes 3 and 4:

"3. *Application of Subsection (b)(3).*—For purposes of subsection (b)(3), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.

4. *Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).*—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).".

Section 2G2.2 is amended in subsection (b)(3) by striking "If the offense involved";

in subparagraphs (A), (C), (D), and (E) by striking "Distribution" and inserting "If the offense involved distribution";

in subparagraph (B) by striking "Distribution for the receipt, or expectation of receipt, of a thing of value," and inserting "If the defendant distributed in exchange for any valuable consideration,";

and in subparagraph (F) by striking "Distribution" and inserting "If the defendant knowingly engaged in distribution,";

and in subsection (b)(4) by inserting "(A)" before "sadistic or masochistic", and by inserting after "violence" the following: "; or (B) sexual abuse or exploitation of an infant or toddler".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by inserting at the end the following: "For additional statutory provision(s), *see* Appendix A (Statutory Index).".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 1 by striking the fourth undesignated paragraph as follows:

" 'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.",

and inserting the following:

" 'The defendant distributed in exchange for any valuable consideration' means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.";

by redesignating Notes 2 through 7 as Notes 3, 5, 6, 7, 8, and 9, respectively;

by inserting after Note 1 the following new Note 2:

"2. *Application of Subsection (b)(3)(F).*—For purposes of subsection (b)(3)(F), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.";

in Note 3 (as so redesignated) by inserting "(A)" after "(b)(4)" both places such term appears;

and by inserting after Note 3 (as so redesignated) the following new Note 4:

"4. *Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b))*.—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).".

Section 2G3.1 is amended in subsection (b)(1) by striking "If the offense involved";

in subparagraphs (A), (C), (D), and (E) by striking "Distribution" and inserting "If the offense involved distribution";

in subparagraph (B) by striking "Distribution for the receipt, or expectation of receipt, of a thing of value," and inserting "If the defendant distributed in exchange for any valuable consideration,";

and in subparagraph (F) by striking "Distribution" and inserting "If the defendant knowingly engaged in distribution,".

The Commentary to §2G3.1 captioned "Application Notes" is amended in Note 1 by striking the fourth undesignated paragraph as follows:

" 'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration.",

and inserting the following:

" 'The defendant distributed in exchange for any valuable consideration' means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other obscene material, preferential access to obscene material, or access to a child.";

by redesignating Notes 2 and 3 as Notes 3 and 4, respectively;

and by inserting after Note 1 the following new Note 2:

"2. *Application of Subsection (b)(1)(F).*—For purposes of subsection (b)(1)(F), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.".

REASON FOR AMENDMENT: This amendment addresses circuit conflicts and application issues related to the child pornography guidelines. One issue generally arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. The other two issues frequently arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. *See* United States Sentencing Commission, "Report to the Congress: Federal Child Pornography Offenses," at 33–35 (2012).

Offenses Involving Infants and Toddlers

First, the amendment addresses differences among the circuits when cases involve infant and toddler victims. The production guideline at §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years. *See* §2G2.1(b)(1)(A)–(B). The non-production guideline at §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. *See* §2G2.2(b)(2).

A circuit conflict has arisen as to whether a defendant who receives an age enhancement under §§2G2.1 and 2G2.2 may also receive a vulnerable victim adjustment at §3A1.1 (Hate Crime Motivation or Vulnerable Victim) when the victim is extremely young and vulnerable, such as an infant or toddler. Section 3A1.1(b)(1) provides for a 2-level increase if the defendant knew or should have known that a victim was a "vulnerable victim," which is defined in the accompanying commentary as a victim "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." *See* §3A1.1, comment. (n.2). The commentary also provides that the vulnerable victim adjustment does not apply if the factor that makes the victim a "vulnerable victim," such as age, is incorporated in the offense guidelines, "unless the victim was unusually vulnerable for reasons unrelated to age." *Id*.

The Fifth and Ninth Circuits have held that it is permissible to apply both enhancements in cases involving infant or toddler victims because their level of vulnerability is not fully incorporated in the offense guidelines. *See United States v. Jenkins*, 712 F.3d 209, 214 (5th Cir. 2013); *United States v. Wright*, 373 F.3d 935, 943 (9th Cir. 2004). These circuits have reasoned that although the victim's small physical size and extreme vulnerability tend to correlate with age, such characteristics are not the same as compared to most children under 12 years. *Jenkins*, 712 F.3d at 214; *Wright*, 373 F.3d at 942–43. The Fourth Circuit, by contrast, has held that the age enhancement and vulnerable victim adjustment may not be simultaneously applied because the child pornography guidelines fully address age-related factors. *See United States v. Dowell*, 771 F.3d 162, 175 (4th Cir. 2014). The Fourth Circuit reasoned that cognitive development or psychological susceptibility necessarily is related to age. *Id.*

The amendment resolves the circuit conflict by explicitly accounting for infant and toddler victims in the child pornography guidelines. Specifically, the amendment revises §§2G2.1 and 2G2.2 by adding a new basis for application of the "sadistic or masochistic" enhancement when the offense involves infants or toddlers. The amendment amends §2G2.1(b)(4) to provide for a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler," and amends §2G2.2(b)(4) to provide a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler." The accompanying application note to each guideline provides that if subsection (b)(4)(B) applies, do not apply the vulnerable victim adjustment in Chapter Three.

The amendment reflects the Commission's view, based on testimony and public comment, that child pornography offenses involving infants and toddlers warrant an enhancement. Because application of the vulnerable victim adjustment necessarily relies on a fact-specific inquiry, the Commission determined that expanding the "sadistic or masochistic" enhancement (§§2G2.1(b)(4) and 2G2.2(b)(4)) to include infant and toddler victims would promote more consistent application of the child pornography guidelines and reduce unwarranted sentencing disparities. In making its determination, the Commission was informed by case law indicating that most circuits have found depictions of the sexual abuse or exploitation of infants or toddlers involving penetration or pain portray sadistic conduct. *See, e.g.*, *United States v. Hoey*, 508 F.3d 687, 691 (1st Cir. 2007) ("We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently 'sadistic' or similarly 'violent' . . . ."); *United States v. Delmarle*, 99 F.3d 80, 83 (2d Cir. 1996) ("[S]ubjection of a young child to a sexual act that would have to be painful is excessively cruel and hence is sadistic . . . ."); *United States v. Maurer*, 639 F.3d 72, 79 (3d Cir. 2011) ("[W]e join other circuits in holding that the application of §2G2.2(b)(4) is appropriate where an image depicts sexual activity involving a prepubescent minor that would have caused pain to the minor."); *United States v. Burgess*, 684 F.3d 445, 454 (4th Cir. 2012) (image depicting vaginal penetration of five-year-old girl by adult male, which would "necessarily cause physical pain to the victim," qualified for sentencing enhancement under §2G2.2(b)); *United States v. Lyckman*, 235 F.3d 234, 238–39 (5th Cir. 2000) (agreeing with the Second, Seventh, and Eleventh Circuits that application of subsection (b)(4) is warranted when the image depicts "the physical penetration of a young child by an adult male."); *United States v. Groenendal*, 557 F.3d 419, 424–26 (6th Cir. 2009) (penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct that justifies application of §2G2.2(b)(4)); *United States v. Meyers*, 355 F.3d 1040, 1043 (7th Cir. 2004) (finding vaginal intercourse between a prepubescent girl and an adult male sadistic); *United States v. Belflower*, 390 F.3d 560, 562 (8th Cir. 2004) (images involving the anal penetration of minor boy or girl adult male are per se sadistic or violent within the meaning of subsection (b)(4)); United States v. Henderson, 649 F.3d 995 (9th Cir. 2010) (vaginal penetration of prepubescent minor qualifies for (b)(4) enhancement); *United States v. Kimler*, 335 F.3d 1132, 1143 (10th Cir. 2003) (finding no expert testimony necessary

for a sentence enhancement [(b)(4)] when the images depicted penetration of prepubescent children by adults); *United States v. Bender*, 290 F.3d 1279, 1286 (11th Cir. 2002) (photograph was sadistic within the meaning of subsection (b)(4) when it depicts the "subjugation of a young child to a sexual act that would have to be painful"). The Commission intends the new enhancement to apply to any sexual images of an infant or toddler.

The Two and Five Level Distribution Enhancements

Next, the amendment addresses differences among the circuits involving application of the tiered distribution enhancements in §2G2.2. Section 2G2.2(b)(3) provides for an increase for distribution of child pornographic material ranging from 2 to 7 levels depending on certain factors. *See* §2G2.2(b)(3)(A)–(F). The circuits have reached different conclusions regarding the mental state required for application of the 2-level enhancement for "generic" distribution as compared to the 5-level enhancement for distribution not for pecuniary gain. The circuit conflicts involving these two enhancements have arisen frequently, although not exclusively, in cases involving the use of peer-to-peer file-sharing programs or networks.

Peer-to-Peer File-Sharing Programs

The Commission's 2012 report to Congress discussed the use of file-sharing programs, such as Peer-to-Peer ("P2P"), in the context of cases involving distribution of child pornography. *See* 2012 Report at 33–35, 48–62. Specifically, P2P is a software application that enables computer users to share files easily over the Internet. These applications do not require a central server or use of email. Rather, the file-sharing application allows two or more users to essentially have access each other's computers and to directly swap files from their computers. Some file-sharing programs require a user to designate files to be shared during the installation process, meaning that at the time of installation the user can "opt in" to share files, and the software will automatically scan the user's computer and then compile a list of files to share. Other programs employ a default file-sharing setting, meaning the user can "opt out" of automatically sharing files by changing the default setting to limit which, if any, files are available for sharing. Once the user has downloaded and set up the file-sharing software, the user can begin searching for files shared on the connected network using search keywords in the same way one regularly uses a search engine such as Google. Users may choose to "opt in" for a variety of reasons, including, for example, to obtain faster download speeds, to have access to a greater range of material, or because the particular site mandates sharing.

The 2-Level Distribution Enhancement

The circuits have reached different conclusions regarding whether application of the 2-level distribution enhancement at §2G2.2(b)(3)(F) requires a mental state (*mens rea*), particularly in cases involving use of a file-sharing program or network. The Fifth, Tenth, and Eleventh Circuits have held that the 2-level distribution enhancement applies if the defendant used a file-sharing program, regardless of whether the defendant did so purposefully, knowingly, or negligently. *See, e.g.*, *United States v. Baker*, 742 F.3d 618, 621 (5th Cir. 2014); *United States v. Ray*, 704 F.3d 1307, 1312 (10th Cir. 2013); *United States v. Creel*, 783 F.3d 1357, 1360 (11th Cir. 2015). The Second, Fourth, and Seventh Circuits have held that the 2-level distribution enhancement requires a showing that the defendant knew of the file-sharing properties of the program. *See, e.g.*, *United States v. Baldwin*, 743 F.3d 357, 361 (2d Cir. 2015) (requiring knowledge); *United States v. Robinson*, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); *United States v. Layton*, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard). The Eighth Circuit has held that knowledge is required, but knowledge may be inferred from the fact that a file-sharing program was used, absent "concrete evidence" of ignorance. *See United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has held that there is a "presumption" that "users of file-sharing software understand others can access their files."

United States v. Conner, 521 Fed. App'x 493, 499 (6th Cir. 2013); *see also United States v. Abbring*, 788 F.3d 565, 567 (6th Cir. 2015) ("the whole point of a file-sharing program is to share, sharing creates a transfer, and transferring equals distribution").

The amendment generally adopts the approach of the Second, Fourth, and Seventh Circuits. It amends §2G2.2(b)(3)(F) to provide that the 2-level distribution enhancement applies if "the defendant knowingly engaged in distribution." Based on testimony, public comment, and data analysis, the Commission determined that the 2-level distribution enhancement is appropriate only in cases in which the defendant knowingly engaged in distribution. An accompanying application note clarifies that: "For purposes of subsection (b)(3)(F), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute." Similar changes are made to the 2-level distribution enhancement at §2G2.1(b)(3) and the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which contains a similarly tiered distribution enhancement.

The 5-Level Distribution Enhancement

Finally, the amendment responds to differences among the circuits in applying the 5-level enhancement for distribution not for pecuniary gain at §2G2.2(b)(3)(B). While courts generally agree that mere use of a file-sharing program or network, without more, is insufficient for application of the 5-level distribution enhancement, the circuits have taken distinct approaches with respect to the circumstances under which the 5-level rather than the 2-level enhancement is appropriate in such circumstances. The Fourth Circuit has held that the 5-level distribution enhancement applies when the defendant (1) "knowingly made child pornography in his possession available to others by some means"; and (2) did so "for the specific purpose of obtaining something of valuable consideration, such as more pornography." *United States v. McManus*, 734 F.3d 315, 319 (4th Cir. 2013). In contrast, while holding that the 5-level enhancement applies when the defendant knew he was distributing child pornographic material in exchange for a thing of value, the Fifth Circuit has indicated that when the defendant knowingly uses file-sharing software, the requirements for the 5-level enhancement are generally satisfied. *See United States v. Groce*, 784 F.3d 291, 294 (5th Cir. 2015).

The amendment revises §2G2.2(b)(3)(B) and commentary to clarify that the 5-level enhancement applies "if the defendant distributed in exchange for any valuable consideration." The amendment further explains in the accompanying application note that this means "the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child." The amendment makes parallel changes to the obscenity guideline at §2G3.1, which has a similar tiered distribution enhancement.

As with the 2-level distribution enhancement, the amendment resolves differences among the circuits in applying the 5-level distribution enhancement by clarifying the mental state required for distribution of child pornographic material for non-pecuniary gain, particularly when the case involves a file-sharing program or network. The Commission determined that the amendment is an appropriate way to account for the higher level of culpability when the defendant had the specific purpose of distributing child pornographic material to another person in exchange for valuable consideration.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 802

AMENDMENT: Section 2L1.1 is amended in subsection (b)(4) by striking the following:

"If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by 2 levels.",

and inserting the following:

"If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor's parent, adult relative, or legal guardian, increase by 4 levels.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by striking the third undesignated paragraph as follows:

"'Aggravated felony' is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).",

and inserting the following:

"'Aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.";

in the paragraph that begins "'Minor' means" by striking "16 years" and inserting "18 years";

and by inserting after the paragraph that begins "'Parent' means" the following new paragraph:

"'Bodily injury,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).";

by renumbering Notes 2 through 6 according to the following table:

Before Amendment	*After Amendment*
4	2
5	3
6	5
2	6
3	7

and by rearranging those Notes, as so renumbered, to place them in proper order;

and by inserting after Note 3 (as so renumbered) the following new Note 4:

"4. *Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse*.—Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), 'serious bodily injury' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.".

Section 2L1.2 is amended by striking subsections (a) and (b) as follows:

"(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.",

and inserting the following:

"(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining—

(A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

(3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.".

The Commentary to §2L1.2 captioned "Statutory Provisions" is amended by striking "8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326" and inserting "8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326".

The Commentary to §2L1.2 captioned "Application Notes" is amended by striking Notes 1 through 7 as follows:

"1. *Application of Subsection (b)(1).*—

(A) *In General.*—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following

a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) *Definitions*.—For purposes of subsection (b)(1):

(i) 'Alien smuggling offense' has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) 'Child pornography offense' means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) 'Crime of violence' means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) 'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) 'Firearms offense' means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) 'Human trafficking offense' means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) 'Sentence imposed' has the meaning given the term 'sentence of imprisonment' in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.

(viii) 'Terrorism offense' means any offense involving, or intending to promote, a 'Federal crime of terrorism', as that term is defined in 18 U.S.C. § 2332b(g)(5).

(C) *Prior Convictions*.—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

2. *Definition of 'Felony'*.—For purposes of subsection (b)(1)(A), (B), and (D), 'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. *Application of Subsection (b)(1)(C).*—

(A) *Definitions*.—For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) *In General*.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).

4. *Application of Subsection (b)(1)(E).*—For purposes of subsection (b)(1)(E):

(A) 'Misdemeanor' means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) 'Three or more convictions' means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

5. *Aiding and Abetting, Conspiracies, and Attempts*.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

6. *Computation of Criminal History Points*.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. *Departure Based on Seriousness of a Prior Conviction*.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. *Examples*: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.";

by redesignating Notes 8 and 9 as Notes 6 and 7, respectively, and inserting before Note 6 (as so redesignated) the following new Notes 1, 2, 3, 4, and 5:

"1. *In General*.—

(A) *'Ordered Deported or Ordered Removed from the United States for the First Time'*.—For purposes of this guideline, a defendant shall be considered 'ordered deported or ordered removed from the United States' if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. 'For the first time' refers to the first time the defendant was ever the subject of such an order.

(B) *Offenses Committed Prior to Age Eighteen*.—Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

2. *Definitions*.—For purposes of this guideline:

'Crime of violence' means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. 'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of

the United States. 'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

'Illegal reentry offense' means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

'Misdemeanor' means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

'Sentence imposed' has the meaning given the term 'sentence of imprisonment' in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

3. *Criminal History Points*.—For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under §4A1.2(a)(2).

A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. *Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time*.—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(3), if it independently would have received criminal history points.

5. *Departure Based on Seriousness of a Prior Offense*.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (*see* §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 2(B) by striking "an aggravated felony" and inserting "a prior conviction".

REASON FOR AMENDMENT: This multi-part amendment is a result of the Commission's multi-year study of immigration offenses and related guidelines, and reflects extensive data collection and analysis relating to immigration offenses and offenders. Based on this data, legal analysis, and public comment, the Commission identified a number of specific areas where changes were appropriate. The first part of this amendment makes several discrete changes to the alien smuggling guideline, §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), while the second part significantly revises the illegal reentry guideline, §2L1.2 (Unlawfully Entering or Remaining in the United States).

Alien Smuggling

The first part of the amendment amends the alien smuggling guideline (§2L1.1). A 2014 letter from the Deputy Attorney General asked the Commission to examine several aspects of this guideline in light of changing circumstances surrounding the commission of these offenses. *See* Letter from James M. Cole to Hon. Patti B. Saris (Oct. 9, 2014). In response, the Commission undertook a data analysis that, in conjunction with additional public comment, suggested two primary areas for change in the guideline.

Unaccompanied Minors

The specific offense characteristic at §2L1.1(b)(4) provides an enhancement "[i]f the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent." The amendment makes several changes to this enhancement.

First, the amendment increases the enhancement at subsection (b)(4) from 2 levels to 4 levels, and broadens its scope to offense-based rather than defendant-based. These two changes were made in light of data, testimony, and public comment indicating that: (1) in recent years there has been a significant increase in the number of unaccompanied minors smuggled into the United States; (2) unaccompanied minors being smuggled are often exposed to deprivation and physical danger (including sexual abuse); (3) the smuggling of unaccompanied minors places a particularly severe burden on public resources when they are taken into custody; and (4) alien smuggling is typically conducted by multimember commercial enterprises that accept smuggling victims without regard to their age, such that an individual defendant is likely to be aware of the risk that unaccompanied minors are being smuggled as part of the offense.

Second, the amendment narrows the scope of the enhancement at subsection (b)(4) by revising the meaning of an "unaccompanied" minor. Prior to the amendment, the enhancement did not apply if the minor was accompanied by the minor's parent or grandparent. The amendment narrows the class of offenders who would receive the enhancement by specifying that the enhancement does not apply if the minor was accompanied by the minor's "parent, adult relative, or legal guardian." This change reflects the view that minors who are accompanied by a parent or another responsible adult relative or legal guardian ordinarily are not subject to the same level of risk as minors unaccompanied by such adults.

Third, the amendment expands the definition of "minor" in the guideline, as it relates to the enhancement in subsection (b)(4), to include an individual under the age of 18. The guideline currently defines "minor" to include only individuals under 16 years of age. The Commission determined that an expanded definition of minor that includes 16- and 17-year-olds is consistent with other aspects of federal immigration law, including the statute assigning responsibility for unaccompanied minors under age 18 to the Department of Health and Human Services. *See* 6 U.S.C. § 279(g)(2)(B). The Commission also believed that it was appropriate to conform the definition of minor in the alien smuggling guideline to the definition of minor in §3B1.4 (Using a Minor to Commit a Crime).

Clarification of the Enhancement Applicable to Sexual Abuse of Aliens

The amendment addresses offenses in which an alien (whether or not a minor) is sexually abused. Specifically, it ensures that a "serious bodily injury" enhancement of 4 levels will apply in such a case. It achieves this by amending the commentary to §2L1.1 to clarify that the term "serious bodily injury" included in subsection (b)(7)(B) has the meaning given that term in the commentary to §1B1.1 (Application Instructions). That instruction states that "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

The Commission's data indicated that the (b)(7)(B) enhancement has not been applied in some cases in which a smuggled alien had been sexually assaulted. The Commission determined that this clarification is warranted to ensure that the 4-level enhancement is consistently applied when the offense involves the sexual abuse of an alien.

Illegal Reentry

The second part of the amendment is the product of the Commission's multi-year study of the illegal reentry guideline. In considering this amendment, the Commission was informed by the Commission's 2015 report, *Illegal Reentry Offenses*; its previous consideration of the "categorical approach" in the context of the definition of "crimes of violence"; and extensive public testimony and public comment, in particular from judges from the southwest border districts where the majority of illegal reentry prosecutions occur.

The amendment responds to three primary concerns. First, the Commission has received significant comment over several years from courts and stakeholders that the "categorical approach" used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty. The existing guideline's single specific offense characteristic provides for enhancements of between 4 levels and 16 levels, based on the nature of a defendant's most serious conviction that occurred before the defendant was "deported" or "unlawfully remained in the United States." Determining whether a predicate conviction qualifies for a particular level of enhancement requires application of the categorical approach to the penal statute underlying the prior conviction. *See generally United States v. Taylor*, 495 U.S. 575 (1990) (establishing the categorical approach). Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted. The definition of "sentence imposed" is the same definition that appears in Chapter Four of the *Guidelines Manual*.

Second, comment received by the Commission and sentencing data indicated that the existing 16- and 12-level enhancements for certain prior felonies committed before a defendant's deportation were overly severe. In fiscal year 2015, only 29.7 percent of defendants who received the 16-level enhancement were sentenced within the applicable sentencing guideline range, and only 32.4 percent of defendants who received the 12-level enhancement were sentenced within the applicable sentencing guideline range.

Third, the Commission's research identified a concern that the existing guideline did not account for other types of criminal conduct committed by illegal reentry offenders. The Commission's 2015 report found that 48.0 percent of illegal reentry offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first deportations.

The amendment addresses these concerns by accounting for prior criminal conduct in a broader and more proportionate manner. The amendment reduces somewhat the level of enhancements for criminal conduct occurring before the defendant's first order of deportation and adds a new enhancement for criminal conduct occurring after the defendant's first order of deportation. It also responds to concerns that prior convictions for illegal reentry offenses may not be adequately accounted for in the existing guideline by adding an enhancement for prior illegal reentry and multiple prior illegal entry convictions.

The manner in which the amendment responds to each of these concerns is discussed in more detail below.

Accounting for Prior Illegal Reentry Offenses

The amendment provides at subsection (b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. A defendant who has one or more felony illegal reentry convictions will receive an increase of 4 levels. "Illegal reentry offense" is defined in the commentary to include all convictions under 8 U.S.C. §§ 1253 (failure to depart after an order of removal) and 1326 (illegal reentry), as well as second or subsequent illegal entry convictions under § 1325(a). A defendant who has two or more misdemeanor illegal entry convictions under 8 U.S.C. § 1325(a) will receive an increase of 2 levels.

The Commission's data indicates that the extent of a defendant's history of illegal reentry convictions is associated with the number of his or her prior deportations or removals from the United States, with the average illegal reentry defendant having been removed from the United States 3.2 times. *Illegal Reentry Offenses*, at 14. Over one-third (38.1%) of the defendants were previously deported after an illegal entry or reentry conviction. *Id.* at 15. The Commission determined that a defendant's demonstrated history of violating §§ 1325(a) and 1326 is appropriately accounted for in a separate enhancement. Because defendants with second or successive § 1325(a) convictions (whether they were charged as felonies or misdemeanors) have entered illegally more than once, the Commission determined that this conduct is appropriately accounted for under this enhancement.

For a defendant with a conviction under § 1326, or a felony conviction under § 1325(a), the 4-level enhancement in the new subsection (b)(1)(A) is identical in magnitude to the enhancement the defendant would receive under the existing subsection (b)(1)(D). The Commission concluded that an enhancement is also appropriate for defendants previously convicted of two or more misdemeanor offenses under § 1325(a).

Accounting for Other Prior Convictions

Subsections (b)(2) and (b)(3) of the amended guideline account for convictions (other than illegal entry or reentry convictions) primarily through a sentence-imposed approach, which is similar to how Chapter Four of the *Guidelines Manual* determines a defendant's criminal history score based on his or her prior convictions. The two subsections are intended to divide the defendant's criminal history into two time periods. Subsection (b)(2) reflects the convictions, if any, that the defendant sustained before being ordered deported or removed from the United States for the first time. Subsection (b)(3) reflects the convictions, if any, that the defendant sustained after that event (but only if the criminal conduct that resulted in the conviction took place after that event).

The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a parallel set of enhancements of:

- 10 levels for a prior felony conviction that received a sentence of imprisonment of five years or more;
- 8 levels for a prior felony conviction that received a sentence of two years or more;
- 6 levels for a prior felony conviction that received a sentence exceeding one year and one month;
- 4 levels for any other prior felony conviction
- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.

The (b)(2) and (b)(3) specific offense characteristics are to be calculated separately, but within each specific offense characteristic, a defendant may receive only the single greatest applicable increase.

The Commission determined that the new specific offense characteristics more appropriately provide for incremental punishment to reflect the varying levels of culpability and risk of recidivism reflected in illegal reentry defendants' prior convictions. The (b)(2) specific offense characteristic reflects the same general rationale as the illegal reentry statute's increased statutory maximum penalties for offenders with certain types of serious pre-deportation predicate offenses (in particular, "aggravated felonies" and "felonies"). *See* 8 U.S.C. § 1326(b)(1) and (b)(2). The Commission's data analysis of offenders' prior felony convictions showed that the more serious types of offenses, such as drug-trafficking offenses, crimes of violence, and sex offenses, tended to receive sentences of imprisonment of two years or more, while the less serious felony offenses, such as felony theft or drug possession, tended to receive much shorter sentences. The sentence-length benchmarks in (b)(2) are based on this data.

The (b)(3) specific offense characteristic focuses on post-reentry criminal conduct which, if it occurred after a defendant's most recent illegal reentry, would receive no enhancement under the existing guideline. The Commission concluded that a defendant who sustains criminal convictions occurring before and after the defendant's first order of deportation warrants separate sentencing enhancement.

The Commission concluded that the length of sentence imposed by a sentencing court is a strong indicator of the court's assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal history is generally scored in the Chapter Four of the *Guidelines Manual*. In amending the guideline, the Commission also took into consideration public testimony and comment indicating that tiered enhancements based on the length of the sentence imposed, rather than the classification of a prior offense under the categorical approach, would greatly simplify application of the guideline. With respect an offender's prior felony convictions, the amendment eliminates the use of the categorical approach, which has been criticized as cumbersome and overly legalistic.

The amendment retains the use of the categorical approach for predicate misdemeanor convictions in the new subsections (b)(2)(E) and (b)(3)(E) in view of a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses. *See* Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 344, 110 Stat. 3009.

The amendment also addresses another frequent criticism of the existing guideline – that its use of a single predicate conviction sustained by a defendant before being deported or removed from the United States to impose an enhancement of up to 16 levels is often disproportionate to a defendant's culpability or recidivism risk. The Commission's data shows an unusually high rate of downward variances and departures from the guideline for such defendants. For example, the Commission's report found that less than one-third of defendants who qualify for a 16-level enhancement have received a within-range sentence, while 92.7 percent of defendants

who currently qualify for no enhancement receive a within-range sentence. *Illegal Reentry Report*, at 11.

The lengths of the terms of imprisonment triggering each level of enhancement were set based on Commission data showing differing median sentence lengths for a variety of predicate offense categories. For example, the Commission's data indicated that sentences for more serious predicate offenses, such as drug-trafficking and felony assault, exceeded the two- and five-year benchmarks far more frequently than did sentences for less serious felony offenses, such as drug possession and theft. With respect to drug-trafficking offenses, the Commission found that 34.6 percent of such offenses received sentences of between two and five years, and 17.0 percent of such offenses received sentences of five years or more. With respect to felony assault offenses, the Commission found that 42.1 percent of such offenses received sentences of between two and five years, and 9.0 percent of such offenses received sentences of five years or more. With respect to felony drug possession offenses, 67.7 percent of such offenses received sentences of 13 months or less, while only 21.3 percent received sentences between two years and five years and only 3.0 percent received sentences of five years or more. With respect to felony theft offenses, 57.1 percent of such offenses received sentences of 13 months or less, while only 17.4 percent received sentences between two years and five years and only 2.0 percent received sentences of five years or more.

The Commission considered public comment suggesting that the term of imprisonment a defendant actually served for a prior conviction was a superior means of assessing the seriousness of the prior offense. The Commission determined that such an approach would be administratively impractical due to difficulties in obtaining accurate documentation. The Commission determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses.

Departure Provision

The amendment adds a new departure provision, at Application Note 5, applicable to situations where "an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense." This departure accounts for three situations in which an enhancement based on the length of a prior imposed sentence appears either inadequate or excessive in light of the defendant's underlying conduct. For example, if a prior serious conviction (*e.g.*, murder) is not accounted for because it is not within the time limits set forth in §4A1.2(e) and did not receive criminal history points, an upward departure may be warranted. Conversely, if the time actually served by the defendant for the prior offense was substantially less than the length of the original sentence imposed, a downward departure may be warranted.

Excluding Stale Convictions

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four. Counting only convictions that receive criminal history points addresses concerns that the existing guideline sometimes has provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points. The Commission's research has found that a defendant's criminal history score is a strong indicator of recidivism risk, and it is therefore appropriate to employ the criminal history rules in this context. *See* U.S. Sentencing Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016). The limitation to offenses receiving criminal history points also promotes ease of application and uniformity throughout the guidelines. *See* 28 U.S.C. § 994(c)(2) (directing the Commission to establish categories of offenses based on appropriate mitigating and aggravating factors);

cf. USSG §2K2.1, comment. (n.10) (imposing enhancements based on a defendant's predicate convictions only if they received criminal history points).

Application of the "Single Sentence Rule"

The amendment also contains an application note addressing the situation when a defendant was simultaneously sentenced for an illegal reentry offense and another federal felony offense. It clarifies that, in such a case, the illegal reentry offense counts towards subsection (b)(1), while the other felony offense counts towards subsection (b)(3).

Because the amendment is intended to make a distinction between illegal reentry offenses and other types of offenses, the Commission concluded that it was appropriate to ensure that such convictions are separately accounted for under the applicable specific offense characteristics, even if they might otherwise constitute a "single sentence" under §4A1.2(a)(2). For example, if the single sentence rule applied, a defendant who was sentenced simultaneously for an illegal reentry and a federal felony drug-trafficking offense might receive an enhancement of only 4 levels under subsection (b)(1), even though, if the two sentences had been imposed separately, the drug offense would result in an additional enhancement of between 4 and 10 levels under subsection (b)(3).

Definition of "Crime of Violence"

The amendment continues to use the term "crime of violence," although now solely in reference to the 2-level enhancement for three or more misdemeanor convictions at subsections (b)(2)(E) and (b)(3)(E). The amendment conforms the definition of "crime of violence" in Application Note 2 to that adopted for use in the career offender guideline effective August 1, 2016. *See* Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 FR 4741 (Jan. 27, 2016). Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the *Guidelines Manual*.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 803

AMENDMENT: Section 5B1.3 is amended in the heading by striking "*Conditions*—" and inserting "*Conditions*";

in subsections (a)(1) through (a)(8) by striking the initial letter of the first word in each subsection and inserting the appropriate capital letter for the word, and by striking the semicolon at the end of each subsection and inserting a period;

in subsection (a)(6), as so amended, by inserting before the period at the end the following: ". If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule";

by striking subsection (a)(9) as follows:

"(9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (*see* 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where

the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;",

and inserting the following:

"(9) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3563(a)).";

and in subsection (a)(10) by striking "the defendant" and inserting "The defendant";

in subsection (b) by striking "The court" and inserting the following:

"*Discretionary Conditions*

The court";

in subsection (c) by striking "(Policy Statement) The" and inserting the following:

" *'Standard' Conditions* (Policy Statement)

The";

and by striking paragraphs (1) through (14) as follows:

"(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.",

and inserting the following:

"(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements

(such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.";

and in subsection (d) by striking "(Policy Statement) The" and inserting the following:

" *'Special' Conditions* (Policy Statement)

The";

by striking paragraph (1) as follows:

"(1) *Possession of Weapons*

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense—a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.",

and inserting the following:

"(1) *Support of Dependents*

(A) If the defendant has one or more dependents—a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child—a condition specifying that the defendant shall make the payments and comply with the other terms of the order.";

and in paragraph (4) by striking "*Program Participation*" in the heading; by inserting "(A)" before "a condition requiring"; and by inserting before the period at the end the following: "; and (B) a condition specifying that the defendant shall not use or possess alcohol".

The Commentary to §5B1.3 captioned "Application Note" is amended by striking Note 1 as follows:

"1. *Application of Subsection (a)(9)(A) and (B).*—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (*See* 42 U.S.C. §§ 16911 and 16913.)",

and inserting the following:

"1. *Application of Subsection (c)(4).*—Although the condition in subsection (c)(4) requires the defendant to 'answer truthfully' the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.".

Section 5D1.3 is amended is amended in the heading by striking "*Conditions*—" and inserting "*Conditions*";

in subsections (a)(1) through (a)(6) by striking the initial letter of the first word in each subsection and inserting the appropriate capital letter for the word, and by striking the semicolon at the end of each subsection and inserting a period;

in subsection (a)(6), as so amended, by inserting before the period at the end the following: ". If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule";

by striking subsection (a)(7) as follows:

"(7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (*see* 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;",

and inserting the following:

"(7) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).";

and in subsection (a)(8) by striking "the defendant" and inserting "The defendant";

in subsection (b) by striking "The court" and inserting the following:

"*Discretionary Conditions*

The court";

in subsection (c) by striking "(Policy Statement) The" and inserting the following:

" *'Standard' Conditions* (Policy Statement)

The";

and by striking paragraphs (1) through (15) as follows:

"(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.",

and inserting the following:

"(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The

probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.";

and in subsection (d) by striking "(Policy Statement) The" and inserting the following:

" *'Special' Conditions* (Policy Statement)

The";

by striking paragraph (1) as follows:

"(1) *Possession of Weapons*

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense—a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.",

and inserting the following:

"(1) *Support of Dependents*

(A) If the defendant has one or more dependents—a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child—a condition specifying that the defendant shall make the payments and comply with the other terms of the order.";

in paragraph (4) by striking "*Program Participation*" in the heading; by inserting "(A)" before "a condition requiring"; and by inserting before the period at the end the following: "; and (B) a condition specifying that the defendant shall not use or possess alcohol";

and by inserting at the end the following new paragraph (8):

"(8) *Unpaid Restitution, Fines, or Special Assessments*

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.".

The Commentary to §5D1.3 captioned "Application Note" is amended by striking Note 1 as follows:

"1. *Application of Subsection (a)(7)(A) and (B).*—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration

and Notification Act, subsection (a)(7)(B) will apply. (*See* 42 U.S.C. §§ 16911 and 16913.)",

and inserting the following:

"1. *Application of Subsection (c)(4).*—Although the condition in subsection (c)(4) requires the defendant to 'answer truthfully' the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.".

REASON FOR AMENDMENT: This amendment is a result of the Commission's multi-year review of sentencing practices relating to federal probation and supervised release. The amendment makes several changes to the guidelines and policy statements related to conditions of probation, §5B1.3 (Conditions of Probation), and supervised release, §5D1.3 (Conditions of Supervised Release).

When imposing a sentence of probation or a sentence of imprisonment that includes a period of supervised release, the court is required to impose certain conditions of supervision listed by statute. 18 U.S.C. §§ 3563(a) and 3583(d). Congress has also empowered courts to impose additional conditions of probation and supervised release that are reasonably related to statutory sentencing factors contained in 18 U.S.C. § 3553(a), so long as those conditions "involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in 3553(a)(2)." 18 U.S.C. § 3563(b); *see also* 18 U.S.C. § 3583(d). Additional conditions of supervised release must also be consistent with any pertinent policy statements issued by the Commission. *See* 18 U.S.C. § 3583(d)(3).

The Commission is directed by its organic statute to promulgate policy statements on the appropriate use of the conditions of probation and supervised release, *see* 28 U.S.C. § 994(a)(2)(B), and has implemented this directive in §§5B1.3 and 5D1.3. The provisions follow a parallel structure, first setting forth those conditions of supervision that are required by statute in their respective subsections (a) and (b), and then providing guidance on discretionary conditions, which are categorized as "standard" conditions, "special" conditions, and "additional" special conditions, in subsections (c), (d), and (e), respectively.

In a number of cases, defendants have raised objections (with varied degrees of success) to the conditions of supervised release and probation imposed upon them at the time of sentencing. *See, e.g.*, *United States v. Munoz*, 812 F.3d 809 (10th Cir. 2016); *United States v. Kappes*, 782 F.3d 828, 848 (7th Cir. 2015); *United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014); *United States v. Bahr*, 730 F.3d 963 (9th Cir. 2013); *United States v. Maloney*, 513 F.3d 350, 357–59 (3d Cir. 2008); *United States v. Saechao*, 418 F.3d 1073, 1081 (9th Cir. 2005). Challenges have been made on the basis that certain conditions are vaguely worded, pose constitutional concerns, or have been categorized as "standard" conditions in a manner that has led to their improper imposition upon particular offenders.

The amendment responds to many of the concerns raised in these challenges by revising, clarifying, and rearranging the conditions contained in §§5B1.3 and 5D1.3 in order to make them easier for defendants to understand and probation officers to enforce. Many of the challenged conditions are those laid out in the Judgment in a Criminal Case Form, AO245B, which are nearly identical to the conditions in §§5B1.3 and 5D1.3.

The amendment was supported by the Criminal Law Committee (CLC) of the Judicial Conference of the United States. The CLC has long taken an active and ongoing role in developing, monitoring and recommending revisions to the condition of supervision, which represent the

core supervision practices required by the federal supervision model. The changes in the amendment are consistent with proposed changes to the national judgment form recently endorsed by the CLC and Administrative Office of the U.S. Courts, after an exhaustive review of those conditions aided by probation officers from throughout the country.

As part of this broader revision, the conditions in §§5B1.3 and 5D1.3 have been renumbered. Where the specific conditions discussed below are identified by a guidelines provision reference, that numeration is in reference to their pre-amendment order.

Court-Established Payment Schedules

First, the amendment amends §§5B1.3(a)(6) and 5D1.3(a)(6) to set forth as a "mandatory" condition that if there is a court-established payment schedule for making restitution or paying a special assessment, the defendant shall adhere to the schedule. Previously, those conditions were classified as "standard." As a conforming change, similar language at §§5B1.3(c)(14) and 5D1.3(c)(14) is deleted. This change is made to more closely adhere to the requirements of 18 U.S.C. § 3572(d).

Sex Offender Registration and Notification Act

Second, the amendment amends §§5B1.3(a)(9) and 5D1.3(a)(7) to clarify that, if the defendant is required to register under the Sex Offender Registration and Notification Act (SORNA), the defendant shall comply with the requirements of the SORNA. Language in the guideline provisions and the accompanying commentary indicating that the Act applies in some states and not in others is correspondingly deleted. After receiving testimony from the Department of Justice suggesting the current condition could be misread, the Commission determined that the condition's language should be simplified and updated to unambiguously reflect that federal sex offender registration requirements apply in all states.

Reporting to the Probation Officer

Third, the amendment divides the initial and regular reporting requirements, §§5B1.3(a)(2) and 5D1.3(a)(2), into two more definite provisions. The amendment also amends the conditions to require that the defendant report to the probation office in the jurisdiction where he or she is authorized to reside, within 72 hours of release unless otherwise directed, and that the defendant must thereafter report to the probation officer as instructed by the court or the probation officer.

Leaving the Jurisdiction

Fourth, the amendment revises §§5B1.3(c)(1) and 5D1.3(c)(1), which prohibit defendants from leaving the judicial district without permission, for clarity and to insert a mental state (*mens rea*) requirement that a defendant must not leave the district "knowingly." Testimony received by the Commission has observed that a rule prohibiting a defendant from leaving the district without permission of the court or probation officer may be unfairly applied to a defendant who unknowingly moves between districts. The Commission concluded that this change appropriately responds to that concern.

Answering Truthfully; Following Instructions

Fifth, the amendment divides §§5B1.3(c)(3) and 5D1.3(c)(3) into separate conditions which individually require the defendant to "answer truthfully" the questions of the probation officer and to follow the instructions of the probation officer "related to the conditions of supervision."

The amendment also adds commentary to clarify that a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of the "answer truthfully" condition. The Commission determined that this approach adequately addresses Fifth Amendment concerns raised by some courts, *see, e.g., United States v. Kappes*, 782 F.3d 828, 848 (7th Cir. 2015) and *United States v. Saechao*, 418 F.3d 1073, 1081 (9th Cir. 2005), while preserving the probation officer's ability to adequately supervise the defendant.

Residence and Employment

Sixth, the amendment clarifies the standard conditions relating to a defendant's residence, §§5B1.3(c)(6) and 5D1.3(c)(6), and the requirement that the defendant work full time, §§5B1.3(c)(5) and 5D1.3(c)(5). The revised conditions spell out in plain language that the defendant must live at a place "approved by the probation officer," and that the defendant must work full time (at least 30 hours per week) at a lawful type of employment—or seek to do so—unless excused by the probation officer. The defendant must also notify the probation officer of changes in residence or employment at least 10 days in advance of the change or, if this is not possible, within 72 hours of becoming aware of a change. The Commission determined that these changes are appropriate to ensure that defendants are made aware of what will be required of them while under supervision. These requirements and associated benchmarks (*e.g.*, 30 hours per week) are supported by testimony from the CLC as appropriate to meet supervision needs.

Visits by Probation Officer

Seventh, the amendment amends the conditions requiring the defendant to permit the probation officer to visit the defendant at any time, at home or elsewhere, and to permit the probation officer to confiscate items prohibited by the defendant's terms of release, §§5B1.3(c)(10) and 5D1.3(c)(10). The revision provides plain language notice to defendants and guidance to probation officers.

The Seventh Circuit has criticized this condition as intrusive and not necessarily connected to the offense of conviction, *see United States v. Kappes*, 782 F.3d 828, 850–51 (7th Cir. 2015) and *United States v. Thompson*, 777 F.3d 368, 379–80 (7th Cir. 2015), but the Commission has determined that, in some circumstance, adequate supervision of defendants may require probation officers to have the flexibility to visit defendants at off-hours, at their workplaces, and without advance notice to the supervisee. For example, some supervisees work overnight shifts and, in order to verify that they are in compliance with the condition of supervision requiring employment, a probation officer might have to visit them at their workplace very late in the evening.

Association with Criminals

Eighth, the amendment revises and clarifies the conditions mandating that the defendant not associate with persons engaged in criminal activity or persons convicted of a felony unless granted permission to do so by the probation officer, §§5B1.3(c)(9) and 5D1.3(c)(9). As amended, the condition requires that the defendant must not "communicate or interact with" any person whom the defendant "knows" to be engaged in "criminal activity" and prohibits the defendant from communicating or interacting with those whom the defendant "knows" to have been "convicted of a felony" without advance permission of the probation officer.

These revisions address concerns expressed by the Seventh Circuit that the condition is vague and lacks a *mens rea* requirement. *See United States v. Kappes*, 782 F.3d 828, 848–49 (7th Cir.

2015); *see also United States v. King*, 608 F.3d 1122, 1128 (9th Cir. 2010) (upholding the condition by interpreting it to have an implicit *mens rea* requirement). The revision adds an express mental state requirement and replaces the term "associate" with more definite language.

Arrested or Questioned by a Law Enforcement Officer

Ninth, the amendment makes clerical changes to the "standard" conditions requiring that the defendant notify the probation officer after being arrested or questioned by a law enforcement officer. *See* §§5B1.3(11) and 5D1.3(11).

Firearms and Dangerous Weapons

Tenth, the amendment reclassifies the "special" conditions which require that the defendant not possess a firearm or other dangerous weapon, §§5B1.3(d)(1) and 5D1.3(d)(1), as "standard" conditions and clarifies those conditions. As amended, the defendant must not "own, possess, or have access to" a firearm, ammunition, destructive device, or dangerous weapon. After reviewing the testimony from the CLC and others, the Commission determined that reclassifying this condition as a "standard" condition will promote public safety and reduce safety risks to probation officers. The amendment also defines "dangerous weapon" as "anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers."

Acting as an Informant

Eleventh, the amendment rewords the "standard" condition at §§5B1.3(c)(12) and 5D1.3(c)(12) requiring that the defendant not enter into an agreement to act as an informant without permission of the court. The condition is revised to improve clarity.

Duty to Notify of Risks Posed by the Defendant

Twelfth, the amendment revises the conditions requiring the defendant, at the direction of the probation officer, to notify others of risks the defendant may pose based on his or her personal history or characteristics, §§5B1.3(c)(13) and 5D1.3(c)(13). As amended, the condition provides that, if the probation officer determines that the defendant poses a risk to another person, the probation officer may require the defendant to tell the person about the risk and permits the probation officer to confirm that the defendant has done so. The Commission determined that this revision is appropriate to address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased. *See United States v. Thompson*, 777 F.3d 368, 379 (7th Cir. 2015).

Support of Dependents

Thirteenth, the amendment clarifies and moves the dependent support requirement from the list of "standard" conditions, §§5B1.3(c)(4) and 5D1.3(c)(4), to the list of "special" conditions in subsection (d). As amended, the conditions require that, if the defendant has dependents, he or she must support those dependents; and if the defendant is ordered to make child support payments, he or she must make the payments and comply with the other terms of the order.

These changes address concerns expressed by the Seventh Circuit that the current condition—which requires a defendant to "support his or her dependents and meet other family responsibilities"—is vague and does apply to defendants who have no dependents. *See United States v. Kappes*, 782 F.3d 828, 849 (7th Cir. 2015) and *United States v. Thompson*, 777 F.3d 368, 379–

80 (7th Cir. 2015). The amendment uses plainer language to provide better notice to the defendant about what is required. The Commission determined that this condition need not apply to all defendants but only to those with dependents.

Alcohol; Controlled Substances; Frequenting Places Where Controlled Substances are Sold

Fourteenth, the standard conditions requiring that the defendant refrain from excessive use of alcohol, not possess or distribute controlled substances or paraphernalia, and not frequent places where controlled substances are illegally sold, §§5B1.3(c)(7)–(8) and 5D1.3(c)(7)–(8), have been deleted. The Commission determined that these conditions are either best dealt with as special conditions or are redundant with other conditions. Specifically, to account for the supervision needs of defendants with alcohol abuse problems, a new special condition that the defendant "must not use or possess alcohol" has been added. The requirement that the defendant abstain from the illegal use of controlled substances is covered by the "mandatory" conditions prohibiting commission of additional crimes and requiring substance abuse testing. Finally, the prohibition on frequenting places where controlled substances are illegally sold is encompassed by the "standard" condition that defendants not associate with those they know to be criminals or who are engaged in criminal activity.

Material Change in Economic Circumstances (§5D1.3 Only)

Finally, with respect to supervised release only, the "standard" condition requiring that the defendant notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments, §5D1.3(c)(15), is reclassified as a "special" condition in subsection (d). Testimony from the CLC and others indicated that defendants on supervised release often have no outstanding restitution, fines, or special assessments remaining at the time of their release, rendering the condition superfluous in those cases. No change has been made to the parallel "mandatory" condition of probation at §5B1.3(a)(7).

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 804

AMENDMENT: Section 2K2.1 is amended in subsection (a)(8) by inserting ", or 18 U.S.C. § 1715" before the period at the end.

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by inserting after "(k)–(o)," the following: "1715,".

The Commentary to §2M6.1 captioned "Application Notes" is amended in Note 1 by striking "831(f)(2)" and inserting "831(g)(2)", and by striking "831(f)(1)" and inserting "831(g)(1)".

The Commentary to §2T1.6 captioned "Background" is amended by striking "The offense is a felony that is infrequently prosecuted.".

Chapter Two, Part T, Subpart 2, is amended in the Introductory Commentary by striking "Because these offenses are no longer a major enforcement priority, no effort" and inserting "No effort".

Section 2T2.1 is amended by striking the Commentary captioned "Background" as follows:

"*Background*: The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1).".

Section 2T2.2 is amended by striking the Commentary captioned "Background" as follows:

"*Background*: Prosecutions of this type are infrequent.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1712 the following:

"18 U.S.C. § 1715	2K2.1";

by inserting after the line referenced to 18 U.S.C. § 2280 the following:

"18 U.S.C. § 2280a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.3, 2K1.4, 2M5.2, 2M5.3, 2M6.1, 2Q1.1, 2Q1.2, 2X1.1, 2X2.1, 2X3.1";

by inserting after the line referenced to 18 U.S.C. § 2281 the following:

"18 U.S.C. § 2281a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, 2X1.1";

and by inserting after the line referenced to 18 U.S.C. § 2332h the following:

"18 U.S.C. § 2332i	2A6.1, 2K1.4, 2M2.1, 2M2.3, 2M6.1".

REASON FOR AMENDMENT: This amendment responds to recently enacted legislation and miscellaneous guideline application issues.

USA FREEDOM Act

The Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act ("USA FREEDOM Act") of 2015, Pub. L. 114–23 (June 2, 2015), set forth changes to statutes related to maritime navigation and nuclear terrorism and provided new and expanded criminal offenses to implement the United States' obligations under certain provisions of four international conventions. The USA FREEDOM Act also specified that the new crimes constitute "federal crimes of terrorism." *See* 18 U.S.C. § 2332b(g)(5). The amendment responds to the USA FREEDOM Act by referencing the new offenses in Appendix A (Statutory Index) to various Chapter Two guidelines covering murder and assault, weapons, national security, and environmental offenses.

First, the USA FREEDOM Act enacted 18 U.S.C. § 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction). Subsections 2280a(a)(1)(A) and (a)(1)(B)(i) prohibit certain acts against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. Subsections 2280a(a)(1)(B)(ii)–(vi) prohibit certain other acts against maritime navigation. Subsection 2280a(a)(1)(C) prohibits transporting another person on board a ship knowing the person has committed a violation under 18 U.S.C. § 2280 (Violence against maritime navigation) or certain subsections of section 2280a, or an offense under a listed counterterrorism treaty. Subsection 2280a(a)(1)(D) prohibits injuring or killing a person in connection with the commission of certain offenses

under section 2280a. Subsection 2280a(a)(1)(E) prohibits attempts and conspiracies under the statute. The penalty for a violation of these subsections is a term of imprisonment for not more than 20 years. If the death of a person results, the penalty is imprisonment for any term of years or for life. Subsection 2280a(a)(2) prohibits threats to commit offenses under subsection 2280a(a)(1)(A), with a penalty of imprisonment of up to five years.

The new offenses at section 2280a are referenced in Appendix A (Statutory Index) to the following Chapter Two guidelines: §§2A1.1 (First Degree Murder); 2A1.2 (Second Degree Murder); 2A1.3 (Voluntary Manslaughter); 2A1.4 (Involuntary Manslaughter); 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault); 2A2.3 (Assault); 2A6.1 (Threatening or Harassing Communications); 2B1.1 (Fraud); 2B3.2 (Extortion); 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials); 2K1.4 (Arson; Property Damage by Use of Explosives); 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License); 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants); 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

Second, the USA FREEDOM Act enacted 18 U.S.C. § 2281a (Additional offenses against maritime fixed platforms). Subsection 2281a(a)(1) prohibits certain acts that occur either on a fixed platform or to a fixed platform committed in a manner that may cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The penalty for a violation of subsection 2281a(a)(1) is a term of imprisonment for not more than 20 years. If the death of a person results, the penalty is imprisonment for any term of years or for life. Subsection 2281a(a)(2) prohibits threats to commit offenses under subsection 2281a(a)(1), and the penalty for a violation of subsection 2281a(a)(2) is imprisonment of up to five years.

The new offenses at 18 U.S.C. § 2281a are referenced to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, and 2X1.1.

Third, the USA FREEDOM Act enacted 18 U.S.C. § 2332i (Acts of nuclear terrorism). Section 2332i prohibits the possession or use of certain radioactive materials or devices with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment, as well as threats to commit any such acts. The penalty for a violation of section 2332i is imprisonment for any term of years or for life.

The new offenses at 18 U.S.C. § 2332i are referenced to §§2A6.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), and 2M6.1.

The amendment also makes clerical changes to Application Note 1 to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction) to reflect the redesignation of a section in the United States Code by the USA FREEDOM Act.

The three new statutes provide a wide range of elements – meaning that the statutes can be violated in a large number of alternative ways. The Commission performed a section-by-section analysis of the elements of the new statutes and identified the Chapter Two offense guidelines that appear most analogous. As a result, the Commission determined that referencing the new statutes in Appendix A (Statutory Index) to a range of guidelines will allow the courts to select

the most appropriate guideline in light of the nature of the conviction. For example, a reference to §2K1.4 (Arson; Property Damage by Use of Explosives) is provided to account for when the defendant is convicted under section 2280a(a)(1)(A)(i) for the use of an explosive device on a ship in a manner that causes or is likely to cause death or serious injury. *See* USSG App. A, Introduction (Where the statute is referenced to more than one guideline section, the court is to "use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted."). The Commission also found it persuasive that other similar statutes are referenced in Appendix A to a similar list of Chapter Two guidelines. Referencing these three new statutes in a manner consistent with the treatment of existing related statutes is reasonable to achieve parity, and will lead to consistent application of the guidelines.

Firearms As Nonmailable Items under 18 U.S.C. § 1715

Section 1715 of title 18 of the United States Code (Firearms as nonmailable; regulations) makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person, and the penalty for a violation of this statute is a term of imprisonment up to two years. Section 1715 is not referenced in Appendix A (Statutory Index). The amendment amends Appendix A to reference offenses under section 1715 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). The amendment also amends §2K2.1 to provide a base offense level of 6 under §2K2.1(a)(8) for convictions under section 1715.

The Commission received public comment suggesting that the lack of specific guidance for section 1715 offenses caused unwarranted sentencing disparity. Commission data provided further support for the need for an amendment to address this issue. Although the data indicated that courts routinely applied §2K2.1 to violations of section 1715, it also evidenced that courts were reaching different results in the base offense level applied. The Commission was persuaded by the data and public comment that an Appendix A reference and corresponding changes to §2K2.1 would reduce those unwarranted sentencing disparities. The Commission determined that §2K2.1 is the most analogous guideline for these types of firearms offenses. By providing an Appendix A reference for section 1715, the amendment ensures that §2K2.1 will be consistently applied to these offenses. Moreover, the Commission decided that the accompanying changes to §2K2.1 will eliminate the disparate application of the base offense levels in that guideline. The Commission selected the base offense level of 6 for these offenses because similar statutory provisions with similar penalties are referenced to §2K2.1(a)(8). The Commission concluded that referencing section 1715 will promote consistency in application and avoid unwarranted sentencing disparities.

Background Commentary to §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax)

The Background Commentary in §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax) states that "[t]he offense is a felony that is infrequently prosecuted." Section 2T1.6 applies to violations of 26 U.S.C. § 7202 (Willful failure to collect or pay over tax) which requires employers to withhold from an employee's paychecks money representing the employee's personal income and Social Security taxes. If an employer willfully fails to collect, truthfully account for, or pay over such taxes, 26 U.S.C. § 7202 provides both civil and criminal remedies. The amendment makes a clerical change to the Background Commentary to §2T1.6 to delete the statement that section 7202 offenses are infrequently prosecuted. The amendment makes additional clerical changes in the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), and the Background Commentary to §§2T2.1 (Non-Payment of Taxes) and 2T2.2 (Regulatory Offenses) which has similar language.

The amendment reflects public comment received by the Commission that indicated while the statement in the Background Commentary to §2T1.6 may have been accurate when the commentary was originally written in 1987, the number of prosecutions under section 7202 have since increased. Additionally, the Commission decided that removing language characterizing the frequency of prosecutions for the tax offenses sentenced under §§2T1.6, 2T2.1, and 2T2.2 will remove the perception that the Commission has taken a position regarding the relative frequency of prosecution of such offenses.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 805

AMENDMENT: The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 by redesignating paragraphs (D) through (L) as paragraphs (E) through (M), respectively; and by inserting the following new paragraph (D):

"(D) 'Court protection order' means 'protection order' as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 2 by striking "Application Note 1(D)(ii) of §1B1.1" and inserting "Application Note 1(E)(ii) of §1B1.1".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 4 by striking "Application Note 1(L) of §1B1.1" and inserting "Application Note 1(M) of §1B1.1".

Section 4A1.3(a)(2) is amended by striking "subsection (a)" and inserting "subsection (a)(1)"; and by striking "sentences for foreign and tribal offenses" and inserting "sentences for foreign and tribal convictions".

The Commentary to §4A1.3 captioned "Application Notes" is amended—

in Note 2 by inserting at the end the following new paragraph (C):

"(C) *Upward Departures Based on Tribal Court Convictions*.—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).";

and in Note 3 by striking "A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B)" and inserting "A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A)".

REASON FOR AMENDMENT: This two-part amendment addresses federal sentencing issues related to offenses committed in Indian country. The amendment responds to the findings and recommendations made by the Commission's *ad hoc* Tribal Issues Advisory Group in its report to the Commission. *See Report of the Tribal Issues Advisory Group* (May 16, 2016), https://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group.

The amendment adds a definition of "court protection order" in the guidelines. This issue was initially raised by the Commission's Victims Advisory Group and subsequently addressed in the Tribal Issues Advisory Group's May 2016 report. The amendment amends §1B1.1 (Application Instructions) to add a definition of "court protection order" that incorporates by reference the statutory definition of a "protection order" as set forth in 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). Under the *Guidelines Manual*, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines. *See* USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence).

The amendment responds to concerns that the term "court protection order" has not been defined in the guidelines and should be clarified. Providing a clear definition of a "court protection order" in the *Guidelines Manual* will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is a consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. The amendment also makes conforming technical changes to the Commentary of §§2B1.3 (Robbery) and 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

The amendment addresses the treatment of tribal court convictions in Chapter Four (Criminal History and Criminal Livelihood) of the *Guidelines Manual*. Subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History) provides that sentences resulting from tribal court convictions are not counted in calculating a defendant's criminal history score but may be considered for an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). Section 4A1.3 provides for an upward departure for prior sentences that are not used in computing the criminal history category, such as sentences for tribal convictions, where reliable information suggests that the defendant's criminal history category under-represents the seriousness of the defendant's prior record.

Tribal court convictions have been excluded from the criminal history score but have been a legitimate basis for upward departure since the original guidelines were promulgated in 1987. In recent years, some tribal courts have gained enhanced sentencing authority under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and expanded jurisdiction over non-Indian defendants in domestic abuse cases under the Violence Against Women Act Reauthorization Act of 2013, Pub. L. 113–4 (Mar. 7, 2013). Many tribal courts have also begun to increase due process protections and reliable record-keeping.

In recognition of these developments, the amendment provides additional guidance to courts on how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions. Specifically, the amendment amends the Commentary to §4A1.3 at Application Note 2(c) to provide the following non-exhaustive list of six factors that courts may consider in deciding whether or to what extent an upward departure based on a tribal conviction may be appropriate:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

Because of the many cultural and historical differences among federally-recognized tribes, and especially among their tribal court systems, the Commission determined that—despite recent developments in Indian law to enlarge the scope of tribal court jurisdiction and the availability of due process in tribal court proceedings—a single approach to the consideration of tribal convictions would be difficult and could potentially lead to a disparate result among Indian defendants in federal courts. The amendment, therefore, reflects the Commission's view that additional guidance about how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions is appropriate, and that the non-exhaustive list of factors provides appropriate guidance and a more structured analytical framework under §4A1.3. The Commission intends, as informed by the Tribal Issues Advisory Group Report and public comment, that none of the factors should be determinative, but collectively the factors reflect important considerations to help courts balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences because of varying tribal court practices and circumstances, and the goal of accurately assessing a defendant's criminal history.

The amendment also includes two technical changes to §4A1.3. First, the amendment amends §4A1.3(a)(2)(A) to change the phrase "sentences for foreign and tribal offenses" to "sentences for foreign and tribal convictions" to track the parallel language in §4A1.2(h) and (i). Second, the amendment makes a clerical change in Application Note 3 to correct an inaccurate reference to §4A1.3(b)(2)(B).

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 806

AMENDMENT: Section 2B1.1(b) is amended by redesignating paragraphs (13) through (19) as paragraphs (14) through (20), respectively; and by inserting the following new paragraph (13):

"(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.";

and in paragraph (17) (as so redesignated) by striking "subsections (b)(2) and (b)(16)(B)" and inserting "subsections (b)(2) and (b)(17)(B)".

The Commentary to §2B1.1 captioned "Application Notes" is amended—

by redesignating Notes 11 through 20 as Notes 12 through 21, respectively; and by inserting the following new Note 11:

"11. *Interaction of Subsection (b)(13) and §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*—If subsection (b)(13) applies, do not apply §3B1.3.";

in Note 12 (as so redesignated) by striking "(b)(14)" both places such term appears and inserting "(b)(15)";

in Note 13 (as so redesignated) by striking "(b)(16)(A)" both places such term appears and inserting "(b)(17)(A)";

in Note 14 (as so redesignated) by striking "(b)(16)(B)" and inserting "(b)(17)(B)"; by striking "(b)(16)(B)(i)" and inserting "(b)(17)(B)(i)"; and by striking "(b)(16)(B)(ii)" and inserting "(b)(17)(B)(ii)";

in Note 15 (as so redesignated) by striking "(b)(18)" both places such term appears and inserting "(b)(19)"; by striking "(b)(18)(A)(iii)" both places such term appears and inserting "(b)(19)(A)(iii)"; and by striking "(b)(16)(B)" both places such term appears and inserting "(b)(17)(B)";

in Note 16 (as so redesignated) by striking "(b)(19)" each place such term appears and inserting "(b)(20)";

and in Note 21(B) (as so redesignated) by striking "(b)(18)(A)(iii)" and inserting "(b)(19)(A)(iii)".

The Commentary to §2B1.1 captioned "Background" is amended by striking "(b)(13)" and inserting "(b)(14)"; by striking "(b)(15)(B)" and inserting "(b)(16)(B)"; by striking "(b)(16)(A)" and inserting "(b)(17)(A)"; by striking "(b)(16)(B)(i)" and inserting "(b)(17)(B)(i)"; by striking "Subsection (b)(17) implements the directive in section 209" and inserting "Subsection (b)(18) implements the directive in section 209"; by striking "Subsection (b)(18) implements the directive in section 225(b)" and inserting "Subsection (b)(19) implements the directive in section 225(b)"; and by striking "(b)(18)(B)" and inserting "(b)(19)(B)".

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. § 408 by inserting ", 2X1.1" at the end; in the line referenced to 42 U.S.C. § 1011 by inserting ", 2X1.1" at the end; and in the line referenced to 42 U.S.C. § 1383a(a) by inserting ", 2X1.1" at the end.

REASON FOR AMENDMENT: This amendment responds to the Bipartisan Budget Act of 2015 ("the Act"), Pub. L. 114–74 (Nov. 2, 2015), which made numerous changes to the statutes governing Social Security fraud offenses at 42 U.S.C. §§ 408, 1011, and 1383a. The Act added new subsections criminalizing conspiracy to commit fraud for selected substantive offenses already proscribed in Title 42 and added an increased statutory penalty provision for certain persons who commit fraud offenses under the relevant Social Security programs.

In response to these statutory changes, the amendment makes changes to both §2B1.1 (Theft, Property Destruction, and Fraud) and Appendix A (Statutory Index). The amendment to §2B1.1 addresses the increased penalty provisions of the Act by adding a new specific offense characteristic with a 4-level enhancement and a minimum offense level of 12 for those defendants subject to a 10-year statutory maximum, and adds commentary precluding the application of an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) when the new enhancement applies. The amendment to Appendix A references the new conspiracy subsections to the appropriate guidelines.

First, the amendment adds a specific offense characteristic to §2B1.1 in response to the enhanced penalty provisions of the Act. The new enhancement provides for a 4-level increase, as well as a minimum offense level of 12, for those defendants convicted under the relevant statutes and subject to the 10-year statutory maximum. The enhancement reflects both Congress's and the Commission's determination regarding the seriousness of these offenses, and further reflects the difficulty in calculating the true harm caused by such defendants, including the harm to the integrity and financial strength of the Social Security program and to legitimate Social Security program benefit recipients who face delays as a result of the review of claims submitted in these cases. The Commission was also persuaded in its determination by the significant administrative efforts and costs resulting from the regulatory requirement that the Social Security Administration review and redetermine the benefit eligibility for every benefit recipient associated with the defendant, whether part of the fraudulent conduct or not. The new enhancement reflects the increased harm caused by these types of cases compared to those types of fraud sentenced under §2B1.1 for which the loss table more appropriately reflects the severity of the offense.

Similar to other minimum offense levels in §2B1.1, the minimum offense level is intended to account for the difficulty in calculating the amount of loss, as well as the unique and non-monetary harms associated with offenses sentenced under the Act. As previously explained in similar contexts, "[t]he Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense." USSG App. C, Amendment 719 (effective Nov. 1, 2008).

In establishing the 4-level increase, the Commission also added commentary precluding the application of an adjustment under §3B1.3 to those defendants who are subject to the Act's increased statutory maximum penalty. In the Act, Congress specifically defined positions of trust in the context of Social Security fraud by subjecting to the increased statutory maximum penalties those defendants who were:

> a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this subchapter (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . . .

The Commission precluded application of §3B1.3 to these defendants because the new 4-level enhancement fully accounts for their special position. Addressing the abuse of special position in this manner will avoid uncertainty, prolonged sentencing hearings, and appeals regarding application of the abuse of trust adjustment to offenders subject to the increased statutory maximum penalties of the Act.

Second, the amendment amends Appendix A to reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The Commission determined that referencing these conspiracy provisions to §2X1.1, as well as the guideline referenced in the statutory index for the substantive offense, is consistent with the instructions at §1B1.2 (Applicable Guidelines).

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 807

AMENDMENT: Section 2D1.1 is amended—

by redesignating subsections (b)(13) through (b)(17) as subsections (b)(14) through (b)(18), respectively; and by inserting the following new subsection (b)(13):

"(13) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels.";

and in each of subsections (c)(1) through (c)(14) by striking "of Fentanyl" each place such term appears and inserting "of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)".

The annotation to §2D1.1(c) captioned "Notes to Drug Quantity Table" is amended by inserting at the end the following new Note (J):

"(J) Fentanyl analogue, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

in Note 6 by striking "Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance" and inserting "Except as otherwise provided, any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and any analogue of that controlled substance"; and by striking "For purposes of this guideline 'analogue' has the meaning" and inserting "Unless otherwise specified, 'analogue,' for purposes of this guideline, has the meaning";

in Note 8(D)—

in the table under the heading "Schedule I or II Opiates*"—

by striking the following two lines:

"1 gm of Alpha-Methylfentanyl = 10 kg of marihuana"

"1 gm of 3-Methylfentanyl = 10 kg of marihuana";

and by inserting after the line referenced to Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) the following line:

"1 gm of a Fentanyl Analogue = 10 kg of marihuana";

in the table under the heading "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*", by striking the following line:

"1 gm of Methcathinone = 380 gm of marihuana";

by inserting after the table under the heading "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" the following new table:

"*Synthetic Cathinones (except Schedule III, IV, and V Substances)**
1 gm of a synthetic cathinone
(except a Schedule III, IV, or V substance) = 380 gm of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.";

by inserting after the table under the heading "Schedule I Marihuana" the following new table:

"*Synthetic Cannabinoids (except Schedule III, IV, and V Substances)**
1 gm of a synthetic cannabinoid
(except a Schedule III, IV, or V substance) = 167 gm of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

'Synthetic cannabinoid,' for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB_1 receptors).";

in Note 16 by striking "§2D1.1(b)(15)(D)" and inserting "§2D1.1(b)(16)(D)";

in Note 18 by striking "(b)(13)" and inserting "(b)(14)"; by striking "(b)(13)(A)" each place such term appears and inserting "(b)(14)(A)"; by striking "(b)(13)(C)–(D)" and inserting "(b)(14)(C)–(D)"; by striking "(b)(13)(C)(ii)" and inserting "(b)(14)(C)(ii)"; and by striking "(b)(13)(D)" and inserting "(b)(14)(D)".

in Note 19 by striking "(b)(14)" each place such term appears and inserting "(b)(15)"; and by striking "(b)(13)(A)" and inserting "(b)(14)(A)";

in Note 20 by striking "(b)(15)" and inserting "(b)(16)"; by striking "(b)(15)(B)" both places such term appears and inserting "(b)(16)(B)"; by striking "(b)(15)(C)" each place such term appears and inserting "(b)(16)(C)"; and by striking "(b)(15)(E)" both places such term appears and inserting "(b)(16)(E)";

in Note 21 by striking "(b)(17)" each place such term appears and inserting "(b)(18)";

and in Note 27 by inserting at the end the following new paragraphs:

"(D) *Departure Based on Potency of Synthetic Cathinones*.—In addition to providing marihuana equivalencies for specific controlled substances and groups of substances, the Drug Equivalency Tables provide marihuana equivalencies for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the marihuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) *Departures for Certain Cases involving Synthetic Cannabinoids*.—

(i) *Departure Based on Concentration of Synthetic Cannabinoids*.—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

(ii) *Downward Departure Based on Potency of Synthetic Cannabinoids*.—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the marihuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.".

The Commentary to §2D1.1 captioned "Background" is amended by striking "(b)(13)(A)" and inserting "(b)(14)(A)"; by striking "(b)(13)(C)(ii)" and inserting "(b)(14)(C)(ii)"; by striking "Subsection (b)(15) implements the directive to the Commission in section 6(3)" and inserting "Subsection (b)(16) implements the directive to the Commission in section 6(3)"; and by striking "Subsection (b)(16) implements the directive to the Commission in section 7(2)" and inserting "Subsection (b)(17) implements the directive to the Commission in section 7(2)".

The Commentary to §2D1.6 captioned "Application Note" is amended in Note 1 by striking ", fentanyl" and inserting ", fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)".

Section 2D1.14(a)(1) is amended by striking "(b)(17)" and inserting "(b)(18)".

The Commentary to §3B1.4 captioned "Application Notes" is amended in Note 2 by striking "§2D1.1(b)(15)(B)" and inserting "§2D1.1(b)(16)(B)".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 7 by striking "§2D1.1(b)(15)(D)" and inserting "§2D1.1(b)(16)(D)".

REASON FOR AMENDMENT: This amendment is a result of the Commission's multi-year study of offenses involving synthetic cathinones (such as methylone, MDPV, and mephedrone) and synthetic cannabinoids (such as JWH-018 and AM-2201), as well as tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues. The study included extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings. The resulting amendment makes various changes to §2D1.1 pertaining to synthetic controlled substances.

The amendment first addresses fentanyl and fentanyl analogues. The Commission learned that while fentanyl has long been a drug of abuse, there are several indications that its abuse has become both more prevalent and more dangerous in recent years. For example, the Drug Enforcement Administration observed a dramatic increase in fentanyl reports between 2013 and 2015, and the Centers for Disease Control and Prevention reported that there were 9,580 deaths involving synthetic opioids (a category including fentanyl) in 2015, a 72.2 percent increase from 2014. The Commission received testimony and other information indicating that fentanyl and its analogues are often trafficked mixed with other controlled substances, including heroin and cocaine. In other instances, fentanyl is placed in pill or tablet form by drug traffickers. Although some purchasers of these substances may be aware that they contain fentanyl (or even seek them out for that reason), others may believe that they are purchasing heroin or pharmaceutically manufactured opioid pain relievers.

Because of fentanyl's extreme potency, the risk of overdose death is great, particularly when the user is inexperienced or unaware of what substance he or she is using. To address this harm, the amendment adds a new specific offense characteristic at §2D1.1(b)(13) to provide for a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. The Commission determined that it is appropriate for traffickers who knowingly misrepresent fentanyl or a fentanyl analogue as another substance to receive additional punishment. If an offender does not know the substance contains fentanyl or a fentanyl analogue, the enhancement does not apply. The specific offense characteristic includes a *mens rea* requirement to ensure that only the most culpable offenders are subjected to these increased penalties.

The amendment also makes a definitional change in the *Guidelines Manual*. Title 21, United States Code, refers to fentanyl by reference to its chemical name (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) and sets mandatory minimum penalties for certain quantities of this substance and for analogues of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, although lesser quantities of the analogues are required to trigger the mandatory minimum penalties. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A)(vi). Consistent with its past practice concerning setting drug-trafficking penalties, the Commission relied upon the statutory framework in setting penalties for fentanyl and fentanyl analogues. Fentanyl has a marihuana equivalency of 1:2,500, while fentanyl analogues have a marihuana equivalency of 1:10,000.

In the *Guidelines Manual*, however, the Commission did not use the chemical name for fentanyl reflected in Title 21. Instead, the Commission used the terms "fentanyl" and "fentanyl analogue" in the Drug Quantity Table.

Commission data suggests that offenses involving fentanyl analogues are increasing in the federal caseload. In studying these cases, the Commission has learned that the reference to "fentanyl analogue" in the Drug Quantity Table may interact in an unintended way with the definition of "analogue" provided by Application Note 6 and Section 802(32) of Title 21, United States Code. Because the guideline incorporates by reference the statutory definition of "controlled substance analogue," and that definition specifically excludes already listed "controlled substances," it appears that a scheduled fentanyl analogue cannot constitute a "controlled substance analogue," and thus does not constitute a fentanyl "analogue" for purposes of §2D1.1. This may have the result that, at sentencing, fentanyl analogues that have already been scheduled must go through the Application Note 6 process to determine the substance most closely related to them.

Additionally, based on implementation of Application Note 6, many courts have then sentenced such analogue cases at the lower fentanyl ratio rather than the higher ratio applicable to fentanyl analogues in the Drug Quantity Table. To address this problem, the amendment adopts a new definition of "fentanyl analogue" as "any substance (including any salt, isomer, or salt of isomer), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)." This portion of the amendment also amends the Drug Quantity Table to clarify that §2D1.1 uses the term "fentanyl" to refer to the chemical name identified by statute and deletes the current listings for alpha-methylfentanyl and 3-methylfentanyl from the Drug Equivalency Tables.

The Commission determined that adopting this definition of "fentanyl analogue" will create a class of fentanyl analogues identical to that already created by statute, clarify the legal confusion that has resulted from the current definition of "analogue" in §2D1.1, and reaffirm that fentanyl analogues are treated differently than fentanyl under the guidelines as well as the statute. Striking the separate references to alpha-methylfentanyl and 3-methylfentanyl will result in the treatment of these substances in common with all other fentanyl analogues. This change, in combination with the adoption of the definition of "fentanyl analogue" and addition of fentanyl analogue to the Drug Equivalency Tables, will limit the use of the listing for "fentanyl" to those cases involving the specific substance named in Title 21.

Next, the amendment addresses synthetic cathinones and synthetic cannabinoids. The Commission received comment from the Department of Justice and others expressing concern that the guidelines do not contain specific "marihuana equivalencies" for synthetic cathinones, such as methylone, mephedrone, and MDPV, or synthetic cannabinoids, such as JWH-018 and AM-2201. For substances that do not appear in either the Drug Quantity Table or the Drug Equivalency Table, Application Note 6 provides courts the process for calculating drug quantities. The note directs courts to identify the "most closely related controlled substance referenced in [§2D1.1]" and to then use that drug's ratio to marihuana to calculate the quantity for purposes of determining the base offense level. Commenters advised that this process is a time-consuming, burdensome task that leads to sentencing disparities. Because Commission data indicated that the majority of cases relying on the Application Note 6 process involved synthetic cathinones and synthetic cannabinoids, the Commission concluded that this amendment will alleviate the burden associated with its application.

Synthetic cathinones, also known as "bath salts," are human-made substances chemically related to cathinone, a stimulant found in the khat plant. Although the Commission's study originally focused on specified cathinones, such as methylone, MDPV, and mephedrone, the Com-

mission received comments indicating that new substances are regularly developed and trafficked and that it would not be feasible to establish a new ratio as each new substance enters the market. Given the large number of potential substances, the Commission found it impracticable to add individual marihuana equivalencies for every synthetic cathinone. In contrast, the Commission determined a class-based approach for synthetic cathinones should capture both current and future synthetic cathinones.

The Commission has determined that synthetic cathinones constitute a well-defined class. Specifically, testimony and comment presented to the Commission consistently indicated that the whether a substance is a synthetic cathinone is not subject to debate. Likewise, comments and testimony made clear that synthetic cathinones share stimulant characteristics and hallucinogenic effects. The Commission determined that a precise definition is not necessary for such substances and that a class-based structure could be reasonably adopted. The Commission likewise determined that, because the class would encompass methcathinone, currently the lone specifically listed synthetic cathinone, the separate reference to methcathinone in the Drug Equivalency Table should be deleted. Given the Commission's priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many new marihuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment creates an entry in the Drug Equivalency Tables for the class of synthetic cathinones, providing a marihuana equivalency of 1 gram of a synthetic cathinone (except a Schedule III, IV, or V substance) equals 380 grams of marihuana and applies a minimum base offense level of 12 to the class of synthetic cathinones. The Commission set a minimum base offense level of 12 for the class of synthetic cathinones to maintain consistency with the treatment of other controlled substances. With limited exceptions, all other Schedule I and II controlled substances are subject to the same minimum base offense level. The Commission was not presented with testimony or commentary that indicated a compelling basis to except synthetic cathinones from the minimum offense level.

The Commission adopted the 380-gram equivalency for three reasons. First, a review of the Commission's data indicated that the 380-gram equivalency was both the median and approximate mean ratio utilized by the courts when sentencing synthetic cathinone cases pursuant to Application Note 6. Thus, the Commission determined that the 380-gram equivalency best reflects the current sentencing practices for courts engaging in the Application Note 6 analysis.

Second, the Commission concluded that a ratio consistent with the existing methcathinone ratio was appropriate. The Commission set the methcathinone ratio based upon a scientific study that found that methcathinone was approximately 1.92 times more potent than amphetamine. At the time, amphetamine had a marihuana equivalency of 1:200, equivalent to the current marihuana equivalency of cocaine. The Commission's current study of cathinones did not uncover any new scientific evidence undermining its rationale for setting the methcathinone ratio.

Third, the Commission was presented with substantial information about synthetic cathinones' risks. Testimony before the Commission established that the effects and potencies of synthetic cathinones range from "at least as dangerous as cocaine" to methamphetamine-like. Medical experts discussed the substantial potential health impacts of cathinone use, while law enforcement witnesses offered reports of cathinone users' aggressive behavior posing threats to first responders. With cocaine at a 1:200 ratio and methamphetamine at a 1:2,000 ratio, the Commission concluded that the ratio of 1:380 minimized the risk of frequent over-punishment for substances in this class while providing penalty levels sufficient to account for the specific harms caused by distribution of these substances.

In adopting a class-based approach for both ease of application and because of the impracticability of listing every new substance in the class as it enters the market, the Commission recognizes, however, that some substances may be significantly more or less potent than the typical substances in the class that the ratio was intended to reflect. Therefore, the Commission added a departure provision to address those substances for which a greater or lesser quantity is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

To provide guidance to the court in determining whether to apply the departure, the departure provision identifies substances that the Commission found to be fair representatives of the synthetic cathinones that would fall within the spectrum of substances included in the class, as well as those that may warrant a departure. Specifically, the departure provision notes that: a typical cathinone has a potency comparable to methcathinone or alpha-PVP; methylone is an example of a lower potency substance; and MDPV is an example of a higher potency substance.

Synthetic cannabinoids mimic the effects of tetrahydrocannabinol ("THC"), the main psychoactive chemical in marihuana. Unlike THC, however, most synthetic cannabinoids are "full agonists." That is, they activate the body's type 1 cannabinoid receptors (CB_1) to a greater degree (*i.e.*, at 100%) than THC, which activates the CB_1 receptors only at 30 to 50 percent. Additionally, unlike THC, synthetic cannabinoids do not contain the additional substances that moderate their adverse effects. To the contrary, they may contain additional substances that augment their hallucinogenic effects. Further, some forms of packaged mixtures (*e.g.*, "K2", "Spice") may contain preservatives, additives, and other chemicals such as benzodiazepines that may compound the adverse effects caused by the cannabinoids. Also unlike THC, synthetic cannabinoids have been associated with physical harms such as organ failure and death.

Through the Commission's multi-year synthetic drug study, the Commission learned that hundreds of synthetic cannabinoids exist. When first marketed, synthetic cannabinoids generally have not yet been scheduled as controlled substances. Often, once a synthetic cannabinoid is scheduled, a new one is created to replace it. Given the large number of potential substances, the Commission found it impracticable to add individual marihuana equivalencies for every synthetic cannabinoid. In contrast, the Commission determined that a class-based approach for synthetic cannabinoids would be a better means to capture both current and future synthetic cannabinoids.

Based on hearing testimony, the scientific literature, and public comment, the Commission determined that all synthetic cannabinoids can be covered by a single class because these substances share a similar pharmacological effect: all synthetic cannabinoids bind to and activate the CB_1 receptor. Given the Commission's priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many new marihuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment defines the term "synthetic cannabinoid" as "any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB_1 receptors)." The amendment establishes a marihuana equivalency for the class of synthetic cannabinoids of 1 gram of a synthetic cannabinoid (except a Schedule III, IV, or V substance) equals 167 grams of marihuana and applies a minimum base offense level of 12 to the class.

The marihuana equivalency selected for the class is identical to the existing marihuana equivalencies for both organic and synthetic tetrahydrocannabinol (THC). The Commission originally derived the organic and synthetic THC equivalencies from a comparison of standard dosage units of THC (3 mg) and marihuana (500 mg) and the relationship between the two, rather than the actual amount of THC commonly found in a dose of marihuana. During its current study, the Commission considered whether to incorporate THC (synthetic) into the new synthetic cannabinoid class. As noted, the new synthetic cannabinoid class will be subject to the minimum base offense level of 12 applicable to most Schedule I and II controlled substances. The Commission set a minimum base offense level of 12 to the class for consistency with other Schedule I and II controlled substances. THC (synthetic) is not currently subject to the same minimum offense level. Thus, incorporating THC (synthetic) into the synthetic cannabinoid class would effectively change penalties for certain THC (synthetic) offenses, an outcome contrary to the Commission's intent. Consequently, THC (synthetic) is exempted from the class, its separate marihuana equivalency is retained, and that equivalency is applicable only in cases involving THC (synthetic).

Nevertheless, the Commission used the same marihuana equivalency for the class of synthetic cannabinoids. Commission data for cases involving synthetic cannabinoids indicates that the courts almost uniformly apply the marihuana equivalency for THC to such cases. Hence, the 1:167 ratio for the synthetic cannabinoid class reflects the courts' current sentencing practices. Although synthetic cannabinoids activate the CB_1 receptor to a greater degree than THC, the evidence also established that synthetic cannabinoids exhibit a range of potencies. Those most frequently encountered in the Commission's data exhibited potencies ranging from one to six times that of THC. Adoption of the existing THC marihuana equivalency minimizes the risk of frequent over-punishment for substances in this class while providing penalty levels that are sufficient to account for the specific harms caused by distribution of these substances.

Finally, the amendment provides two departure provisions addressing synthetic cannabinoids. First, the amendment provides for a departure based on the concentration of a synthetic cannabinoid. The Commission learned that synthetic cannabinoids are manufactured as a powder or crystalline substance and are typically sprayed on or mixed with inert material (such as plant matter) before retail sale. As a result, a synthetic cannabinoid seized after it has been prepared for retail sale will typically weigh significantly more than the undiluted form of the same controlled substance.

Given the central role of drug quantity in setting the base offense level, an individual convicted of an offense involving a synthetic cannabinoid mixture would likely be subject to a guideline penalty range significantly higher than another individual convicted of an offense involving an undiluted synthetic cannabinoid (but who could nevertheless produce an equivalent amount of consumable product). In a case involving undiluted synthetic cannabinoid, an upward departure may be appropriate for that reason. By contrast, in a case where the mixture containing synthetic cannabinoids contained a high quantity of inert material, a downward departure may be warranted.

The second departure provision provides that a downward departure may be appropriate where a substantially greater quantity of the synthetic cannabinoid involved in the offense is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class. The two synthetic cannabinoids specifically cited in the Commission's priority, JWH-018 and AM-2201, are three and a half times and five times more potent, respectively, than THC. If an offense involves a substantially less potent synthetic cannabinoid than JWH-018 or AM-2201, the court may wish to consider whether a downward departure is appropriate.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 808

AMENDMENT: The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 5 by striking "Drug Equivalency Tables" and inserting "Drug Equivalency Tables (currently called Drug Conversion Tables)".

Section 2D1.1(c)(1), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● 90,000 KG or more of *Converted Drug Weight*.".

Section 2D1.1(c)(2), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 30,000 KG but less than 90,000 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(3), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 10,000 KG but less than 30,000 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(4), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 3,000 KG but less than 10,000 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(5), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 1,000 KG but less than 3,000 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(6), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 700 KG but less than 1,000 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(7), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 400 KG but less than 700 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(8), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 100 KG but less than 400 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(9), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 80 KG but less than 100 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(10), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 60 KG but less than 80 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(11), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 40 KG but less than 60 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(12), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 20 KG but less than 40 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(13), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

" ● At least 10 KG but less than 20 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(14), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

" ● At least 5 KG but less than 10 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(15) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

" ● At least 2.5 KG but less than 5 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(16) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon; and by adding at the end the following:

" ● At least 1 KG but less than 2.5 KG of *Converted Drug Weight*.".

Section 2D1.1(c)(17) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon; and by adding at the end the following:

" ● Less than 1 KG of *Converted Drug Weight*.".

The annotation to §2D1.1(c) captioned "Notes to Drug Quantity Table", as amended by Amendment 807, is further amended by inserting at the end the following new Note (K):

"(K) The term 'Converted Drug Weight,' for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.".

The Commentary to §2D1.1 captioned "Application Notes", as amended by Amendment 807, is further amended—

in Note 6 by striking "marihuana equivalency" and inserting "converted drug weight"; and by inserting after "the most closely related controlled substance referenced in this guideline." the following: "*See* Application Note 8.";

in the heading of Note 8 by striking "Drug Equivalency Tables" and inserting "Drug Conversion Tables";

in Note 8(A) by striking "Drug Equivalency Tables" both places such term appears and inserting "Drug Conversion Tables"; by striking "to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana" and inserting "to find the converted drug weight of the controlled substance involved in the offense"; by striking "Find the equivalent quantity of marihuana" and inserting "Find the corresponding converted drug weight"; by striking "Use the offense level that corresponds to the equivalent quantity of marihuana" and inserting "Use the offense level that corresponds to the converted drug weight determined above"; by striking "an equivalent quantity of 5 kilograms of marihuana" and inserting "5 kilograms of converted drug weight"; and by striking "the equivalent quantity of marihuana would be 500 kilograms" and inserting "the converted drug weight would be 500 kilograms";

in Note 8(B) by striking "Drug Equivalency Tables" each place such term appears and inserting "Drug Conversion Tables"; by striking "convert each of the drugs to its marihuana equivalent" and inserting "convert each of the drugs to its converted drug weight"; by striking "For certain types of controlled substances, the marihuana equivalencies" and inserting "For certain types of controlled substances, the converted drug weights assigned"; by striking "*e.g.*, the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana" and inserting "*e.g.*, the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight"; by striking "determine the marihuana equivalency for each schedule separately" and inserting "determine the converted drug weight for each schedule separately"; and by striking "Then add the marihuana equivalencies to determine the combined marihuana equivalency" and inserting "Then add the converted drug weights to determine the combined converted drug weight";

in Note 8(C)(i) by striking "of marihuana" each place such term appears and inserting "of converted drug weight"; and by striking "The total is therefore equivalent to 95 kilograms" and inserting "The total therefore converts to 95 kilograms";

in Note 8(C)(ii) by striking the following:

"The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 8 in the Drug Quantity Table.",

and inserting the following:

"The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.";

in Note 8(C)(iii) by striking "is equivalent" both places such term appears and inserting "converts"; by striking "of marihuana" each place such term appears and inserting "of converted drug weight"; and by striking "The total is therefore equivalent" and inserting "The total therefore converts";

in Note 8(C)(iv) by striking "marihuana equivalency" each place such term appears and inserting "converted drug weight"; by striking "76 kilograms of marihuana" and inserting "76 kilograms"; by striking "79.99 kilograms of marihuana" both places such term appears and inserting "79.99 kilograms of converted drug weight"; by striking "equivalent weight" each place such term appears and inserting "converted weight"; by striking "9.99 kilograms of marihuana" and inserting "9.99 kilograms"; and by striking "2.49 kilograms of marihuana" and inserting "2.49 kilograms";

in Note 8(D)—

in the heading, by striking "Drug Equivalency Tables" and inserting "Drug Conversion Tables";

under the heading relating to Schedule I or II Opiates, by striking the heading as follows:

"*Schedule I or II Opiates**",

and inserting the following new heading:

"*Schedule I or II Opiates** *Converted Drug Weight*";

and by striking "of marihuana" each place such term appears;

under the heading relating Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the heading as follows:

"*Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)**",

and inserting the following new heading:

"*Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)** *Converted Drug Weight*";

and by striking "of marihuana" each place such term appears;

under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking the heading as follows:

"*Synthetic Cathinones (except Schedule III, IV, and V Substances)**",

and inserting the following new heading:

"*Synthetic Cathinones*
*(except Schedule III, IV, and V Substances)** *Converted Drug Weight*";

and by striking "of marihuana";

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the heading as follows:

"*LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)**",

and inserting the following new heading:

"*LSD, PCP, and Other Schedule I and II Hallucinogens*
*(and their immediate precursors)** *Converted Drug Weight*";

and by striking "of marihuana" each place such term appears;

under the heading relating to Schedule I Marihuana, by striking the heading as follows:

"*Schedule I Marihuana*",

and inserting the following new heading:

"*Schedule I Marihuana* *Converted Drug Weight*";

and by striking "of marihuana" each place such term appears;

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking the heading as follows:

"*Synthetic Cannabinoids (except Schedule III, IV, and V Substances)**",

and inserting the following new heading:

"*Synthetic Cannabinoids*
*(except Schedule III, IV, and V Substances)** *Converted Drug Weight*";

and by striking "of marihuana";

under the heading relating to Flunitrazepam, by striking the heading as follows:

"*Flunitrazepam***",

and inserting the following new heading:

"*Flunitrazepam*** *Converted Drug Weight*";

and by striking "of marihuana";

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking the heading as follows:

"*Schedule I or II Depressants (except gamma-hydroxybutyric acid)*",

and inserting the following new heading:

"*Schedule I or II Depressants*
(except gamma-hydroxybutyric acid) *Converted Drug Weight*";

and by striking "of marihuana";

under the heading relating to Gamma-hydroxybutyric Acid, by striking the heading as follows:

"*Gamma-hydroxybutyric Acid*",

and inserting the following new heading:

"*Gamma-hydroxybutyric Acid* *Converted Drug Weight*";

and by striking "of marihuana";

under the heading relating to Schedule III Substances (except ketamine), by striking the heading as follows:

"*Schedule III Substances (except ketamine)****",

and inserting the following new heading:

"*Schedule III Substances (except ketamine)**** *Converted Drug Weight*";

by striking "1 gm of marihuana" and inserting "1 gm"; by striking "equivalent weight" and inserting "converted weight"; and by striking "79.99 kilograms of marihuana" and inserting "79.99 kilograms of converted drug weight";

under the heading relating to Ketamine, by striking the heading as follows:

"*Ketamine*",

and inserting the following new heading:

"*Ketamine* *Converted Drug Weight*";

and by striking "of marihuana";

under the heading relating to Schedule IV Substances (except flunitrazepam), by striking the heading as follows:

"*Schedule IV Substances (except flunitrazepam)*****",

and inserting the following new heading:

"*Schedule IV Substances (except flunitrazepam)***** *Converted Drug Weight*";

by striking "0.0625 gm of marihuana" and inserting "0.0625 gm"; and by striking "*****Provided, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana." and inserting "****Provided, that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.";

under the heading relating to Schedule V Substances, by striking the heading as follows:

"*Schedule V Substances*******",

and inserting the following new heading:

"*Schedule V Substances****** *Converted Drug Weight*";

by striking "0.00625 gm of marihuana" and inserting "0.00625 gm"; and by striking "******Provided, that the combined equivalent weight of Schedule V substances shall not exceed 2.49 kilograms of marihuana." and inserting "*****Provided, that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.";

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking the heading as follows:

"*List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)********",

and inserting the following new heading:

"*List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)******* *Converted Drug Weight*";

by striking "of marihuana" each place such term appears; and by striking "*******Provided, that in a case involving" and inserting "******Provided, that in a case involving";

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking the heading as follows:

"*Date Rape Drugs (except flunitrazepam, GHB, or ketamine)*",

and inserting the following new heading:

"*Date Rape Drugs (except flunitrazepam, GHB, or ketamine)* *Converted Drug Weight*";

and by striking "marihuana" both places such term appears;

and in the text before the heading relating to Measurement Conversion Table, by striking "To facilitate conversions to drug equivalencies" and inserting "To facilitate conversions to converted drug weight";

in Note 27(D) by striking "marihuana equivalencies" both places such term appears and inserting "converted drug weights"; by striking "Drug Equivalency Tables" and inserting "Drug

Conversion Tables"; and by striking "marihuana equivalency" and inserting "converted drug weight";

and in Note 27(E)(ii) by striking "marihuana equivalency" and inserting "converted drug weight".

The Commentary to §2D1.1 captioned "Background", as amended by Amendment 807, is further amended by adding at the end the following new paragraph:

"The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 *Guidelines Manual*, the Drug Equivalency Tables provided four conversion factors (or 'equivalents') for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in §2D1.1. *See* USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended §2D1.1 to replace marihuana as the conversion factor with the new term 'converted drug weight' and to change the title of the Drug Equivalency Tables to the 'Drug Conversion Tables.' ".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 9 by striking "Drug Equivalency Table" and inserting "Drug Conversion Table".

The Concluding Commentary to Part D of Chapter Three is amended in Example 2 by striking "marihuana equivalents" and inserting "converted drug weight"; by striking "Drug Equivalency Tables" and inserting "Drug Conversion Tables"; and by striking "of marihuana" each place such term appears and inserting "of converted drug weight".

REASON FOR AMENDMENT: This amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). It replaces the term "marihuana equivalency," which is used in the Drug Equivalency Tables for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances, with the term "converted drug weight."

The Commission received comment expressing concern that the term "marihuana equivalency" is misleading and results in confusion for individuals not fully versed in the guidelines. Some commenters suggested that the Commission should replace "marihuana equivalency" with another term.

Specifically, the amendment adds the new term "converted drug weight" to all provisions of the Drug Quantity Table at §2D1.1(c) and changes the title of the "Drug Equivalency Tables" to "Drug Conversion Tables." In addition, the amendment makes technical changes throughout the *Guidelines Manual* to account for the new term.

This amendment is not intended as a substantive change in policy for §2D1.1.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 809

AMENDMENT: Section 2L1.2(b)(2) is amended by striking "If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—" and inserting "If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—".

Section 2L1.2(b)(3) is amended by striking "If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—" and inserting "If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—".

The Commentary to §2L1.2 captioned "Application Notes" is amended—

in Note 2 in the paragraph that begins "'Sentence imposed' has the meaning" by striking "includes any term of imprisonment given upon revocation of probation, parole, or supervised release" and inserting "includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred";

in Note 4 by striking "subsection (b)(3)," and inserting "subsection (b)(2) or (b)(3), as appropriate,";

and by redesignating Notes 5 through 7 as Notes 6 through 8, respectively; and by inserting the following new Note 5:

"5. *Cases in Which the Criminal Conduct Underlying a Prior Conviction Occurred Both Before and After the Defendant Was First Ordered Deported or Ordered Removed*.— There may be cases in which the criminal conduct underlying a prior conviction occurred both before and after the defendant was ordered deported or ordered removed from the United States for the first time. For purposes of subsections (b)(2) and (b)(3), count such a conviction only under subsection (b)(2)."

REASON FOR AMENDMENT: This amendment responds to two application issues that arose after §2L1.2 (Unlawfully Entering or Remaining in the United States) was extensively amended in 2016. *See* USSG App. C, Amendment 802 (effective Nov. 1, 2016).

The specific offense characteristic at §2L1.2(b)(2) applies a sliding scale of enhancements, based on sentence length, if the "defendant sustained" a "conviction" before being ordered removed for the first time. Correspondingly, §2L1.2(b)(3) applies a parallel scale of enhancements if the defendant "engaged in criminal conduct resulting in" a conviction "at any time after" the first order of removal. In most situations, any prior felony conviction that received criminal history points will qualify under either subsection (b)(2) or (b)(3), with the extent of the increase depending on the length of the sentence imposed. In some scenarios, a felony will not qualify for an upward adjustment under either subsection (b)(2) or (b)(3) even though it received criminal history points. Those scenarios occur when a defendant committed a crime before being ordered removed for the first time but was not convicted (or sentenced) for that crime until after that first order of removal.

The amendment addresses this issue by establishing that the application of the §2L1.2(b)(2) enhancement depends on the timing of the underlying "criminal conduct," and not on the timing of the resulting conviction. It does so by amending the first paragraph of subsection (b)(2)

to state that the enhancement applies if pre-first removal conduct resulted in a conviction "at any time," and makes a conforming change to the first paragraph of subsection (b)(3). In order to address how to treat an offense involving conduct that occurred both before and after a defendant's first order of removal, the amendment adds a new Application Note 5 explaining that an offense involving such conduct should be counted only under subsection (b)(2). The Commission determined that a defendant with a prior non-illegal reentry felony conviction that received criminal history points should receive an enhancement for that conviction under either subsection (b)(2) or (b)(3). A defendant should not avoid an enhancement for an otherwise qualifying conviction because the conviction occurred after a defendant's first order of removal or deportation but was premised on conduct that occurred before that order. Because a conviction could be premised on conduct that occurred both before and after the first order of removal or deportation, the Commission adopted Application Note 5 to explain that such convictions are only counted once, under subsection (b)(2).

The specific offense characteristics at §2L1.2(b)(2) and (b)(3) increase a defendant's offense level based on the length of the "sentence imposed" for a prior felony conviction. An application note defines "sentence imposed" to mean "sentence of imprisonment" as that term is used in the criminal history guideline, §4A1.2. *See* USSG §2L1.2, comment. (n.2.). Consistent with that definition, the application note also directs that "[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release." *Id*.

Another part of the commentary to §2L1.2 directs that only convictions receiving criminal history points under "§4A1.1(a), (b), or (c)" (which assign points based on the length of the prior sentence imposed) are to be counted under §2L1.2(b). *See* USSG §2L1.2, comment. (n.3). In determining the length of a sentence for purposes of Chapter Four (and thus the number of criminal history points to be applied), the length of any term imposed on revocation of probation, parole, supervised release, or other similar status is added to the original term of imprisonment and the total term is used to calculate criminal history points under §4A1.1(a), (b), or (c). *See* USSG §4A1.2(k)(1).

A Fifth Circuit opinion interpreted §2L1.2(b)(2) to bar consideration of a revocation that did not occur until *after* a defendant's first order of removal, even if the defendant was convicted prior to the first order of the removal. *See United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017). The court found that Application Note 2, despite its instruction that "the length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release," was insufficiently clear to resolve the "temporal" question of when a revocation must occur, given that the Commission had resolved a prior circuit conflict in 2012 by directing that revoked time should not be counted in the situation. *See* USSC App. C, Amendment 764 (effective Nov. 1, 2012). A subsequent decision of the Ninth Circuit reached the same result. *See United States v. Martinez*, 870 F.3d 1163 (9th Cir. 2017). Although both cases involved an enhancement under subsection (b)(2), the same logic would seem to apply to enhancements under subsection (b)(3) when the conviction and revocation were separated by an intervening order of removal or deportation.

The amendment resolves this issue by adding the clarifying phrase "regardless of when the revocation occurred" to the definition of "sentence imposed" in Application Note 2. The Commission determined that, consistent with the purposes of the 2016 amendment to §2L1.2, the data underlying it, and the statement in Application Note 2, the length of a sentence imposed for purposes of §2L1.2(b)(2) and (b)(3) should include any additional term of imprisonment imposed upon revocation of probation, suspended sentence, or supervised release, regardless of whether the revocation occurred before or after the defendant's first (or any subsequent) order of removal. As the reason for amendment for Amendment 802 explained, "[t]he Commis-

sion determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses." USSC, App. C, Amendment 802 (effective Nov. 1, 2016). Excluding sentence length added by post-removal revocations would be inconsistent with the purpose of Amendment 802 and its underlying data analysis. *Id*.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 810

AMENDMENT: The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 1(A) by striking "However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility" and inserting "A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous".

REASON FOR AMENDMENT: This amendment responds to concerns that some courts have interpreted the commentary to §3E1.1 (Acceptance of Responsibility) to automatically preclude application of the 2-level reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct. Application Note 1 provides a non-exhaustive list of appropriate considerations in determining whether a defendant has clearly demonstrated acceptance of responsibility. Among those considerations is whether the defendant truthfully admitted the conduct comprising the offense(s) of conviction and truthfully admitted or did not falsely deny any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). *See* USSG §3E1.1, comment. (n.1(A)). The application note further provides that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." The amendment clarifies that an unsuccessful challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous. Specifically, the amendment adds "but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous" to the end of Application Note 1(A).

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 811

AMENDMENT: The Commentary to §5C1.1 captioned "Application Notes" is amended by redesignating Notes 4 through 9 as Notes 5 through 10, respectively; and by inserting the following new Note 4:

"4. If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). *See* 28 U.S.C. § 994(j). For purposes of this application note, a 'nonviolent first offender' is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase 'comparable judicial dispositions of any kind' includes diversionary or deferred

dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.".

The Commentary to §5F1.2 captioned "Application Notes" is amended in Note 1 by striking "Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention" and inserting "Electronic monitoring is an appropriate means of surveillance for home detention"; and by striking "alternative means of surveillance may be used so long as they are as effective as electronic monitoring" and inserting "alternative means of surveillance may be used if appropriate".

The Commentary to §5F1.2 captioned "Background" is amended by striking "The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring" and inserting "The Commission has concluded that electronic monitoring is an appropriate means of surveillance for home detention"; and by striking "the court should be confident that an alternative form of surveillance will be equally effective" and inserting "the court should be confident that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant's case".

Section 5H1.3 is amended by striking "*See* §5C1.1, Application Note 6" and inserting "*See* §5C1.1, Application Note 7".

Section 5H1.4 is amended by striking "*See* §5C1.1, Application Note 6" and inserting "*See* §5C1.1, Application Note 7".

REASON FOR AMENDMENT: The amendment adds a new application note to the Commentary at §5C1.1 (Imposition of a Term of Imprisonment), which states that if a defendant is a "non-violent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment." This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the "general appropriateness of imposing a sentence other than imprisonment" for "a first offender who has not been convicted of a crime of violence or an otherwise serious offense" and cites the statutory provision in support. It also is consistent with a recent Commission recidivism study, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate. *See* Tracey Kyckelhahn & Trishia Cooper, U.S. Sentencing Comm'n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 6–9 (2017).

Where permitted by statute, the *Guidelines Manual* provides for non-incarceration sentences for offenders in Zones A and B of the Sentencing Table. Zone A (in which all sentencing ranges are zero to six months regardless of criminal history category) permits the full spectrum of sentencing options: (1) a fine only; (2) a term of probation only; (3) probation with conditions of confinement (home detention, community confinement, or intermittent confinement); (4) a "split sentence" (a term of imprisonment followed by a term of supervised release with condition of confinement that substitutes for a portion of the guideline term); or (5) a term of imprisonment only. Zone B (which includes sentencing ranges that have a low-end of one month and a high-end of 15 months, and vary by criminal history category) also authorizes non-prison sentences. However, Zone B sentencing options are more restrictive, authorizing (1) probation with conditions of confinement; (2) a "split sentence"; or (3) a term of imprisonment only. Consistent with the statutory mandate in section 994(j), the application note is intended to serve as a reminder to courts to consider imposing non-incarceration sentences for a defined class of "nonviolent first offenders" whose applicable guideline ranges are in Zones A or B of the Sentencing Table.

For purposes of the new application note, the amendment defines a "nonviolent first offender" as a defendant who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense. It explains that "comparable judicial dispositions of any kind" includes "diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications."

The amendment adopts language from the statutory and guidelines "safety-valve" provisions to exclude offenders who "use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense." *See* 18 U.S.C § 3553(f)(2); USSG §5C1.2(a)(2). This real-offense definition of "violent" offense avoids the complicated application of the "categorical approach" to determine whether an offense qualifies as "violent." *See United States v. Starks*, 861 F.3d 306, 324 (1st Cir. 2017) (describing the "immensely complicated analysis required by the categorical approach"); *see also* USSG §5C1.2, comment. (n.3) (noting that the determination of whether "the offense" was violent or involved a firearm requires a court to consider not only the offense of conviction but also "all relevant conduct"). It also ensures that only nonviolent offenders are covered by the new application note.

The amendment also deletes language from the commentary to §5F1.2 (Home Detention) that generally encouraged courts to use electronic monitoring (also called location monitoring) when home detention is made a condition of supervision, and instead instructs that electronic monitoring or any alternative means of surveillance may each be used, as "appropriate." The goal of this change is to increase the use of probation with home detention as an alternative to incarceration. The Commission received testimony indicating that location monitoring is resource-intensive and otherwise demanding on probation officers. Additionally, it heard testimony that imposing location monitoring by default is inconsistent with the evidence-based "risk-needs-responsivity" (RNR) model of supervision and may be counterproductive for certain lower-risk offenders. For many low-risk offenders, less intensive surveillance methods (*e.g.*, telephonic contact, video conference, unannounced home visits by probation officers) are sufficient to enforce home detention. The revised language would allow probation officers and courts to exercise discretion to use surveillance methods that they deem appropriate in light of evidence-based practices.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 812

AMENDMENT: The Commentary to §2A3.5 captioned "Statutory Provision" is amended by striking "§ 2250(a)" and inserting "§ 2250(a), (b)".

The Commentary to §2A3.5 captioned "Application Notes" is amended by redesignating Note 2 as Note 3; and by inserting the following new Note 2:

"2. *Application of Subsection (b)(1).*—For purposes of subsection (b)(1), a defendant shall be deemed to be in a 'failure to register status' during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).".

Section 2A3.6(a) is amended by striking "§ 2250(c)" and inserting "§ 2250(d)".

The Commentary to §2A3.6 captioned "Statutory Provisions" is amended by striking "2250(c)" and inserting "2250(d)".

The Commentary to §2A3.6 captioned "Application Notes" is amended—

in Note 1 by striking "Section 2250(c)" and inserting "Section 2250(d)"; and by inserting after "18 U.S.C. § 2250(a)" the following: "or (b)";

in Note 3 by striking "§ 2250(c)" and inserting "§ 2250(d)";

and in Note 4 by striking "§ 2250(c)" and inserting "§ 2250(d)".

Section 2B5.3(b)(5) is amended by striking "counterfeit drug" and inserting "drug that uses a counterfeit mark on or in connection with the drug".

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1 by striking the third undesignated paragraph as follows:

"'Counterfeit drug' has the meaning given that term in 18 U.S.C. § 2320(f)(6).";

and by inserting after the paragraph that begins "'Counterfeit military good or service' has the meaning" the following new paragraph:

"'Drug' and 'counterfeit mark' have the meaning given those terms in 18 U.S.C. § 2320(f).".

The Commentary to §2G1.3 captioned "Application Notes" is amended in Note 4 by striking "(b)(3)" each place such term appears and inserting "(b)(3)(A)".

Section 5D1.3(a)(6)(A) is amended by striking "18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664" and inserting "18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution".

Appendix A (Statutory Index) is amended—

in the line referenced to 15 U.S.C. § 2615 by striking "§ 2615" and inserting "§ 2615(b)(1)";

by inserting before the line referenced to 15 U.S.C. § 6821 the following new line reference:

"15 U.S.C. § 2615(b)(2) 2Q1.1";

in the line referenced to 18 U.S.C. § 2250(a) by striking "§ 2250(a)" and inserting "§ 2250(a), (b)";

and in the line referenced to 18 U.S.C. § 2250(c) by striking "§ 2250(c)" and inserting "§ 2250(d)".

REASON FOR AMENDMENT: This multi-part amendment responds to recently enacted legislation and miscellaneous guideline application issues.

First, the amendment responds to section 6 of the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. 114–119 (Feb. 8, 2016), which added a new registration requirement for certain sex offenders required to register under the Sex Offender Registration and Notification Act (SORNA) at 34 U.S.C. § 20914. SORNA requires sex offenders to register in the sex offender registry, and keep their registration current, by providing certain identifying information including names, addresses, and Social Security Numbers. The new requirement at 34 U.S.C. § 20914(7) directs sex offenders to provide information relating to intended travel

outside the United States, including any anticipated dates and places of departure, arrival or return, air carrier and flight numbers, and destination country. The Act also established a new offense at 18 U.S.C. § 2250(b). For those required to register under SORNA, knowingly failing to provide this travel-related information and engaging or attempting to engage in the intended travel outside of the United States, carries a statutory maximum of 10 years of imprisonment. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender). The amendment amends Appendix A so the new offense at 18 U.S.C. § 2250(b) is referenced to §2A3.5. The amendment also adds a new Application Note 2 to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b)(1), a defendant shall be considered in a "failure to register status" during the time the defendant engaged in conduct described in either section 2250(a) (failing to register or update registration) or section 2250(b) (failing to provide required travel-related information). This application note reflects the Commission's determination that failing to provide information about intended foreign travel meets the definition of failing to update registration information in the sex offender registry. In addition, the amendment makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the adoption of section 2250(b) and the associated redesignation of section 2250(c) as section 2250(d).

Second, the amendment responds to section 3 of the Transnational Drug Trafficking Act of 2016, Pub. L. 114–154 (May 16, 2016), which made changes relating to the trafficking of counterfeit drugs by amending the language in the penalty provision at 18 U.S.C. § 2320. The Act amended section 2320(b)(3) to replace the term "counterfeit drug" with the phrase "a drug that uses a counterfeit mark on or in connection with the drug." The Act also revised section 2320(f) to define the term "drug" by reference to the term as defined in the Federal Food, Drug, and Cosmetic Act found at 21 U.S.C. § 321. Section 2320 offenses are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark). The amendment replaces the term "counterfeit drug" at §2B5.3(b)(5) with the new phrase in the revised section 2320(b)(3), to remain consistent with the language of the statute. Similarly, the amendment amends the commentary to §2B5.3 to remove a definition for the obsolete term "counterfeit drug" and replace it with definitions of the terms "drug" and "counterfeit mark" as found in the revised statute.

Third, the amendment responds to section 12 of the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016, Pub. L. 114–182 (June 22, 2016), which amended section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) by adding a new provision at section 2615(b)(2). The new provision prohibits any person from knowingly and willfully violating specific provisions of the Toxic Substances Control Act, knowing at the time of the violation that the violation puts a person in imminent danger of death or bodily injury, with a maximum penalty of 15 years of imprisonment. The Toxic Substances Control Act is referenced in Appendix A (Statutory Index) to §2Q1.2 (Mishandling of Hazardous or Toxic Substances of Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). The amendment continues to reference the preexisting offense, now codified at section 2615(b)(1), to §2Q1.2, but references the new offense, codified at section 2615(b)(2), to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants). The Commission determined §2Q1.1 is the most analogous guideline because it covers similar "knowing endangerment" provisions and has a similar *mens rea* element found in similar statutes referenced in Appendix A to §2Q1.1.

Fourth, the amendment responds to section 2 of the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016), which amended 18 U.S.C. § 3583(d) (relating to conditions of supervised release) to require a court, when imposing a sentence of supervised release, to include as a condition that the defendant make restitution in accordance with sections 3663 and 3663A of Title 18 of the United States Code, or any other statute authorizing a sentence

of restitution. The amendment amends subsection (a)(6)(A) of §5D1.3 (Conditions of Supervised Release) to include a mandatory condition of supervised release in conformance with the new statutory requirement. The amendment also parallels the Judicial Conference of the United States' recent revision of the Judgment in a Criminal Case form to include a new mandatory condition of supervised release.

Fifth, the amendment clarifies an application issue that has arisen with respect to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), which applies to several offenses involving the transportation of a minor for illegal sexual activity. A two-level enhancement at §2G1.3(b)(3) applies if the offense involved the use of a computer to either (A) persuade, entice or coerce a minor, or to facilitate the travel of a minor, to engage in prohibited sexual conduct, or (B) to entice, offer, or solicit a person to engage in prohibited sexual conduct with a minor. While Application Note 4 sets forth guidance on this enhancement, it fails to distinguish between the two prongs of subsection (b)(3). As a result, an application issue has arisen regarding whether the note prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor, as set out in subsection (b)(3)(B). Courts have concluded that the application note is inconsistent with the language of §2G1.3(b)(3), and that application of the enhancement for the use of a computer in third party solicitation cases is proper. *See, e.g.*, *United States v. Cramer*, 777 F.3d 597, 606 (2d Cir. 2015); *United States v. McMillian*, 777 F.3d 444, 449–50 (7th Cir. 2015); *United States v. Hill*, 782 F.3d 842, 846 (11th Cir. 2015); *United States v. Pringler*, 765 F.3d 455 (5th Cir. 2014). The amendment is intended to clarify the Commission's original intent that Application Note 4 apply only to subsection (b)(3)(A).

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 813

AMENDMENT: Chapter One, Part A is amended—

in Subpart 1(4)(b) (Departures) by inserting an asterisk after "§5K2.19 (Post-Sentencing Rehabilitative Efforts)"; and by inserting after the first paragraph the following note:

"*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (*See* USSG App. C, amendment 768.)";

and in the note at the end of Subpart 1(4)(d) (Probation and Split Sentences) by striking "Supplement to Appendix C" and inserting "USSG App. C".

The Commentary to §1B1.13 captioned "Application Notes" is amended in Note 4 by striking "factors set forth 18 U.S.C. § 3553(a)" and inserting "factors set forth in 18 U.S.C. § 3553(a)".

The Commentary to §2A3.5 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Sex offense' has the meaning" by striking "42 U.S.C. § 16911(5)" and inserting "34 U.S.C. § 20911(5)"; and in the paragraph that begins "'Tier I offender', 'Tier II offender', and 'Tier III offender' have the meaning" by striking "42 U.S.C. § 16911" and inserting "34 U.S.C. § 20911".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2(A)(i) by striking "determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction" and inserting the following: "specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines)".

The Commentary to §2B1.5 captioned "Application Notes" is amended—

in Note 1(A) by striking clause (ii) and redesignating clauses (iii) through (vii) as clauses (ii) through (vi), respectively;

in Note 1(A)(i) by striking "16 U.S.C. § 470w(5)" and inserting "54 U.S.C. § 300308";

in Note 3(C) by striking "16 U.S.C. § 470a(a)(1)(B)" and inserting "54 U.S.C. § 302102";

in Note 3(E) by striking "the Antiquities Act of 1906 (16 U.S.C. § 431)" and inserting "54 U.S.C. § 320301";

and in Note 3(F) by striking "16 U.S.C. § 1c(a)" and inserting "54 U.S.C. § 100501".

Section 2D1.11 is amended in subsection (d)(6) by striking "Pseuodoephedrine" and inserting "Pseudoephedrine"; and in subsection (e)(2), under the heading relating to List I Chemicals, by striking the period at the end and inserting a semicolon.

The Commentary to §2M2.1 captioned "Statutory Provisions" is amended by striking "§ 2153" and inserting "§§ 2153"; and by inserting at the end the following: "For additional statutory provision(s), *see* Appendix A (Statutory Index).".

The Commentary to §2Q1.1 captioned "Statutory Provisions" is amended by striking "42 U.S.C. § 6928(e)" and inserting "42 U.S.C. §§ 6928(e), 7413(c)(5)"; and by inserting at the end the following: "For additional statutory provision(s), *see* Appendix A (Statutory Index).".

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by striking "7413" and inserting "7413(c)(1)–(4)".

The Commentary to §2Q1.3 captioned "Statutory Provisions" is amended by striking "7413" and inserting "7413(c)(1)–(4)".

The Commentary to §2Q1.3 captioned "Application Notes" is amended in Note 8 by striking "Adequacy of Criminal History Category" and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by striking "Adequacy of Criminal History Category" and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "42 U.S.C. § 14133" and inserting "34 U.S.C. § 12593".

Section 4A1.2 is amended in subsections (h), (i), and (j) by striking "Adequacy of Criminal History Category" each place such term appears and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Notes 6 and 8 by striking "Adequacy of Criminal History Category" both places such term appears and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

The Commentary to §4B1.4 captioned "Background" is amended by striking "Adequacy of Criminal History Category" and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

Section 5B1.3(a)(10) is amended by striking "42 U.S.C. § 14135a" and inserting "34 U.S.C. § 40702".

Section 5D1.3 is amended in subsection (a)(4) by striking "release on probation" and inserting "release on supervised release"; and in subsection (a)(8) by striking "42 U.S.C. § 14135a" and inserting "34 U.S.C. § 40702".

Section 8C2.1(a) is amended by striking "§§2C1.1, 2C1.2, 2C1.6" and inserting "§§2C1.1, 2C1.2".

Appendix A (Statutory Index) is amended—

by striking the line referenced to 16 U.S.C. § 413;

in the line referenced to 18 U.S.C. § 371 by rearranging the guidelines to place them in proper numerical order;

in the line referenced to 18 U.S.C. § 1591 by rearranging the guidelines to place them in proper numerical order;

by inserting after the line referenced to 18 U.S.C. § 1864 the following new line reference:

"18 U.S.C. § 1865(c) 2B1.1";

by inserting after the line referenced to 33 U.S.C. § 3851 the following new line references:

"34 U.S.C. § 10251 2B1.1

34 U.S.C. § 10271 2B1.1

34 U.S.C. § 12593 2X5.2

34 U.S.C. § 20962 2H3.1

34 U.S.C. § 20984 2H3.1";

and by striking the lines referenced to 42 U.S.C. § 3791, 42 U.S.C. § 3795, 42 U.S.C. § 14133, 42 U.S.C. § 16962, and 42 U.S.C. § 16984.

REASON FOR AMENDMENT: This amendment makes various technical changes to the *Guidelines Manual*.

First, the amendment sets forth clarifying changes to two guidelines. The amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768,

effective November 1, 2012. The amendment also makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is "referenced to this guideline" if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Second, the amendment makes technical changes to provide updated references to certain sections in the United States Code that were restated in legislation. As part of an Act to codify existing law relating to the National Park System, Congress repealed numerous sections in Title 16 of the United States Code, and restated them in Title 18 and a newly enacted Title 54. *See* Pub. L. 113–287 (Dec. 19, 2014). The amendment amends the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) to correct outdated references to certain sections in Title 16 that were restated, with minor revisions, when Congress enacted Title 54. It also deletes from the Commentary to §2B1.5 the provision relating to the definition of "historic resource," as that term was omitted from Title 54. In addition, the amendment makes a technical change to Appendix A (Statutory Index), to correct an outdated reference to 16 U.S.C. § 413 by replacing it with the appropriate reference to 18 U.S.C. § 1865(c).

Third, the amendment makes additional technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective September 1, 2017, the Office of Law Revision Counsel transferred certain provisions bearing on crime control and law enforcement, previously scattered throughout various parts of the United States Code, to a new Title 34. To reflect the new section numbers of the reclassified provisions, the amendment makes changes to: the Commentary to §2A3.5 (Failure to Register as a Sex Offender); the Commentary to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)); subsection (a)(10) of §5B1.3 (Conditions of Probation); subsection (a)(8) of §5D1.3 (Conditions of Supervised Release); and Appendix A (Statutory Index).

Fourth, the amendment makes clerical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Finally, the amendment also makes clerical changes to—

- the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), by inserting a missing word in Application Note 4;

- subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a typographical error in the line referencing Pseudoephedrine;

- subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a punctuation mark under the heading relating to List I Chemicals;

- the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned "Statutory Provisions," by adding a missing section symbol and a reference to Appendix A (Statutory Index);

- the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned "Statutory Provisions," by adding a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);

- the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned "Statutory Provisions," by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);

- the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned "Statutory Provisions," by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);

- subsection (a)(4) to §5D1.3. (Conditions of Supervised Release), by changing an inaccurate reference to "probation" to "supervised release";

- subsection (a) of §8C2.1 (Applicability of Fine Guidelines), by deleting an outdated reference to §2C1.6, which was deleted by consolidation with §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) effective November 1, 2004; and

- the lines referencing "18 U.S.C. § 371" and "18 U.S.C. § 1591" in Appendix A (Statutory Index), by rearranging the order of certain Chapter Two guidelines references to place them in proper numerical order.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 814

AMENDMENT: Section 1B1.13 is amended—

by inserting at the beginning the following new heading: "(a) *In General*.—";

by striking "Bureau of Prisons under" and inserting "Bureau of Prisons or the defendant pursuant to";

and by inserting at the end the following:

"(b) *Extraordinary and Compelling Reasons*.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) *Medical Circumstances of the Defendant*.—

(A) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end-of-life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(B) The defendant is—

(i) suffering from a serious physical or medical condition,

(ii) suffering from a serious functional or cognitive impairment, or

(iii) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or at imminent risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) due to personal health risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be adequately mitigated in a timely manner.

(2) *Age of the Defendant*.—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(3) *Family Circumstances of the Defendant*.—

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.

(B) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

(D) The defendant establishes that circumstances similar to those listed in paragraphs (3)(A) through (3)(C) exist involving any other immediate

family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for such family member or individual. For purposes of this provision, 'immediate family member' refers to any of the individuals listed in paragraphs (3)(A) through (3)(C) as well as a grandchild, grandparent, or sibling of the defendant.

(4) *Victim of Abuse*.—The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

(A) sexual abuse involving a 'sexual act,' as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C. § 2246(2)(D) regardless of the age of the victim); or

(B) physical abuse resulting in 'serious bodily injury,' as defined in the Commentary to §1B1.1 (Application Instructions);

that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant.

For purposes of this provision, the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.

(5) *Other Reasons*.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

(6) *Unusually Long Sentence*.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

(c) *Limitation on Changes in Law*.—Except as provided in subsection (b)(6), a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement. However, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement, a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

(d) *Rehabilitation of the Defendant*.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement. However, rehabilitation of the defendant while serving the sentence

may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted.

(e) *Foreseeability of Extraordinary and Compelling Reasons*.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.".

The Commentary to §1B1.13 captioned "Application Notes" is amended—

by striking Notes 1 through 5 as follows:

"1. *Extraordinary and Compelling Reasons*.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) *Medical Condition of the Defendant*.—

(i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) *Age of the Defendant*.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) *Family Circumstances*.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) *Other Reasons*.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

2. *Foreseeability of Extraordinary and Compelling Reasons*.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

3. *Rehabilitation of the Defendant*.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.

4. *Motion by the Director of the Bureau of Prisons*.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

5. *Application of Subdivision (3)*.—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.";

and by inserting the following new Notes 1 and 2:

"1. *Interaction with Temporary Release from Custody Under 18 U.S.C. § 3622 ('Furlough')*.—A reduction of a defendant's term of imprisonment under this policy statement is not appropriate when releasing the defendant under 18 U.S.C. § 3622 for a limited time adequately addresses the defendant's circumstances.

2. *Notification of Victims*.—Before granting a motion pursuant to 18 U.S.C. § 3582(c)(1)(A), the Commission encourages the court to make its best effort to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.".

The Commentary to §1B1.13 captioned "Background" is amended by striking "the Commission is authorized" and inserting "the Commission is required".

REASON FOR AMENDMENT: This amendment responds to, among other things, the First Step Act of 2018 ("First Step Act"), Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239, which amended 18 U.S.C. § 3582(c)(1)(A) to authorize courts to grant a motion for a sentence reduction upon a defendant's own motion. Previously, a court was authorized to do so only upon the

motion of the Director of the Bureau of Prisons ("BOP"). Congress amended the law for the express purpose, set forth on the face of the enactment, of "increasing the use" of sentence reduction motions under section 3582(c)(1)(A). First Step Act § 603(b).

Section 3582(c)(1)(A) authorizes a court to reduce a defendant's term of imprisonment if "extraordinary and compelling reasons" warrant a reduction and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Congress directed the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98–473, 98 Stat. 1987, 2023 (codified at 28 U.S.C. § 994(t)). Congress also directed the Commission to promulgate general policy statements regarding the appropriate use of section 3582(c). 28 U.S.C. § 994(a)(2)(C).

For more than 30 years, reductions pursuant to section 3582(c)(1)(A) could be granted only upon the motion of the BOP. BOP filed such motions extremely rarely—the number of defendants receiving relief averaged two dozen per year—and for the most part limited its motions to cases involving inmates who were expected to die within a year or were profoundly and irremediably incapacitated. U.S. Dep't of Just., Off. of the Inspector Gen., The Federal Bureau of Prisons' Compassionate Release Program, I-2013-006 1 & n.9 (2013).

Sentence reductions under section 3582(c)(1)(A) thus came to be known as "compassionate release," though that phrase appears nowhere in the SRA and sentence reductions that do not result in immediate release are authorized by the law. BOP's sparing use of its authority persisted despite guidance from the Commission in 2007 that "extraordinary and compelling reasons" can be based on (a) the medical condition of the defendant, (b) the age of the defendant, (c) the defendant's family circumstances, and (d) reasons other than, or in combination with, those three specified ones. USSG App. C, amend. 698 (effective Nov. 1, 2007).

In 2018, the First Step Act put an end BOP's gatekeeping function and allowed individuals to file motions for sentence reductions under the statute. Because the Commission lost its quorum in early 2019 and did not regain it until 2022, it was unable to amend §1B1.13 during the more than four-year period since defendants were first permitted to file such motions. During those years, courts have found extraordinary and compelling reasons warranting sentence reductions based on all of the factors the Commission identified in 2007, *i.e.*, the three specified bases of medical condition, age, and family circumstances, and the "other reasons" catchall. Commission data indicate courts have hewed to the "extraordinary and compelling" requirement, *see* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT (Dec. 2022), at tbls. 10, 12, & 14, and while they have found such circumstances to be present in more cases than BOP had before the First Step Act, they have been judicious in granting relief.

Among other things, the amendment extends the applicability of the policy statement to defendant-filed motions; expands the list of specified extraordinary and compelling reasons that can warrant sentence reductions; retains the existing "other reasons" catchall; provides specific guidance with regard to the permissible consideration of changes in the law; and responds to case law that developed after the enactment of the First Step Act.

The amendment is informed by Commission data, including its analysis of the factors identified by courts in granting sentence reduction motions in the years since the First Step Act was signed into law. It is also informed by extensive public comment, including from the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, law professors, currently and formerly incarcerated individuals, and other stakeholders in the federal criminal justice system.

Applicability to Defendant-Filed Motions and Structural Revisions

The amendment revises §1B1.13(a) to reflect that a defendant is now authorized to file a motion under 18 U.S.C. § 3582(c)(1)(A), making the policy statement applicable to both defendant-filed and BOP-filed motions.

The amendment also makes two structural changes to §1B1.13. First, it moves the description of the permissible bases for a reduction from the Commentary to the policy statement itself.

Second, the amendment moves Application Notes 2 and 3 into the body of the policy statement as new subsections (e) and (d). Application Note 3 previously provided that, pursuant to 28 U.S.C. § 994(t), rehabilitation of a defendant is not, by itself, an extraordinary and compelling reason for purposes of §1B1.13. New subsection (d) adopts this same language but adds, consistent with the plain language of section 994(t) and courts' interpretations of it, that rehabilitation of the defendant while incarcerated may be considered *in combination* with other circumstances in determining whether extraordinary and compelling reasons warrant a sentence reduction. *See* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT (Dec. 2022), tbls. 10, 12 & 14 (showing that courts have frequently considered rehabilitation in connection with other factors when granting sentence reduction motions). Application Note 2 provided that "an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment." New subsection (e) retains this instruction without change.

Revisions to "Extraordinary and Compelling Reasons"

The amendment expands the list of specified extraordinary and compelling reasons and retains the "other reasons" basis for a sentence reduction to better account for and reflect the plain language of section 3582(c)(1)(A), its legislative history, and decisions by courts made in the absence of a binding policy statement.

The list of specified "extraordinary and compelling reasons" is expanded by: (a) adding two new subcategories to the "Medical Circumstances of the Defendant" ground for relief; (b) making three modifications to the "Family Circumstances" ground; (c) adding a new ground called "Victim of Abuse"; and (d) adding a new ground called "Unusually Long Sentence," which permits a judge to consider a non-retroactive change in sentencing law as an extraordinary and compelling reason in specified circumstances.

The first of the two new subcategories under "Medical Circumstances of the Defendant" applies when a defendant is "suffering from a medical condition that requires long-term or specialized medical care that is not being provided" and who, without that care, "is at risk of serious deterioration in health or death." The second applies when a defendant, due to personal health risk factors and custodial status, is at increased risk of suffering severe medical complications or death as a result of exposure to an ongoing outbreak of infectious disease or public health emergency. The amendment incorporates several factors courts considered during the COVID-19 pandemic related to the defendant's individual health circumstances, the level of risk at the defendant's facility, and the ability to adequately mitigate the defendant's individualized risk. The public health emergency prong requires that the emergency be declared by the appropriate governmental authority. These new subcategories reflect the medical circumstances not expressly identified in §1B1.13 that were most often cited by courts in granting sentence reduction motions during the pandemic. *See* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT (Dec. 2022) tbls. 10, 12 & 14.

The second modification to the list of specified extraordinary and compelling reasons revises the "Family Circumstances" ground in three ways. First, it expands the existing provision relating to the death or incapacitation of the caregiver of a defendant's minor child to include a child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. This expansion reflects the Commission's determination that providing care for a non-minor child with severe caretaking needs presents a circumstance similar to providing care for a minor child, as some courts have recognized. *See, e.g.*, *United States v. Barnes*, No. 3:17-cr-00011, 2021 WL 1269783, at *4 (S.D. Ind. Jan. 29, 2021) (granting a sentence reduction to a defendant whose 21-year-old son had numerous physical and mental disabilities that required 24-hour care, finding these circumstances "to be analogous to a minor child"). Second, the amendment adds a new provision for cases in which a defendant's parent is incapacitated and the defendant would be the only available caregiver. Other than the relationships specified in the current policy statement, a parent has been the family member most often identified as needing care by courts granting sentence reductions under § 3582(c)(1)(A). *See* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC (2022), at 32; *see also United States v. Bucci*, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) (concluding that there is "no reason to discount" a defendant's caregiving role "simply because the incapacitated family member is a parent and not a spouse," registered partner, or minor child). The third modification to the family circumstances ground for relief adds a provision that applies when the defendant establishes that similar circumstances exist with respect to a person whose relationship with the defendant is similar in kind to that of an immediate family member, and the defendant would be the only available caregiver. This provision recognizes the diversity of family structures in America, and that caretaking needs within all of those family structures may give rise to equally extraordinary and compelling circumstances. The amendment accords with decisions by courts after the First Step Act. *See, e.g.*, *United States v. Griffin*, No. 1:95-cr-00751, 2020 WL 7295765, at *2–3 (S.D. Fla. Dec. 8, 2020) (granting release because the defendant was "the only viable, adequate caregiver for his sister" who had significant cognitive impairment due to vascular dementia and stroke); *United States v. Reyes*, No. 04-cr-970, 2020 WL 1663129, at *3 (N.D. Ill. Apr. 3, 2020) (granting defendant relief to assist in caring for his aunt with stage four cancer, recognizing "non-traditional family arrangements and the need for others in the family to contribute when a relative is sick"). Relief is available under this subsection only if the defendant establishes both the qualifying relationship and that the defendant is the only available caregiver.

The third modification to the list of specified extraordinary and compelling reasons adds a ground for relief at new subsection (b)(4) ("Victim of Abuse"), which applies if a defendant has suffered sexual or physical abuse that was committed by or at the direction of a correctional officer, an employee or contractor of the BOP, or any other individual having custody or control over the defendant. This provision responds to the Department of Justice's ("DOJ") suggestion that a sentence reduction may be appropriate where an individual in BOP custody has been determined to have been the victim of sexual assault perpetrated by BOP personnel. PRINCIPAL ASSOC. DEPUTY ATT'Y GEN. WORKING GRP. OF DOJ COMPONENTS, DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE DEPARTMENT OF JUSTICE'S RESPONSE TO SEXUAL MISCONDUCT BY EMPLOYEES OF THE BUREAU OF PRISONS 22 (2022); *see also* STAFF OF PERMANENT S. SUBCOMM. ON INVESTIGATIONS, 117TH CONG., REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS (Comm. Print 2022) (summarizing results of investigation into sexual abuse of federal prisoners in BOP custody). New subsection (b)(4) is limited to instances in which the defendant was a victim of either (a) sexual abuse involving a "sexual act," as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C. § 2246(2)(D) regardless of the age of the victim); or (b) physical abuse resulting in "serious bodily injury," as defined at §1B1.1, while in custody serving the term of imprisonment sought to be reduced. New subsection (b)(4) provides that the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding,

unless the defendant establishes that such proceedings are unduly delayed or the defendant is in imminent danger.

Apart from the specified extraordinary and compelling reasons, the amendment retains the "Other Reasons" catchall ground currently found in Application Note 1(D). It also makes clear that extraordinary and compelling reasons exist if the defendant presents any other circumstance or combination of circumstances that, considered by themselves or together with any of the reasons specified in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4). The Commission considered but specifically rejected a requirement that "other reasons" be similar in nature and consequence to the specified reasons. Rather, they need be similar only in gravity, a requirement that inheres in the statutory requirement that they present extraordinary and compelling reasons for a sentence reduction. *See* 18 U.S.C. § 3582(c)(1)(A).

The Commission recognized that during the period between the enactment of the First Step Act in 2018 and this amendment, district courts around the country based sentence reductions on dozens of reasons and combinations of reasons. Based on a careful review of those cases, the Commission continues to believe what is stated in Application Note 4 to the current policy statement, *i.e.*, that judges are "in a unique position to determine whether the circumstances warrant a reduction." Guidance beyond that provided in the amended policy statement regarding what circumstances or combination of circumstances are sufficiently extraordinary and compelling to warrant a reduction in sentence is best provided by reviewing courts, rather than through an effort by the Commission to predict and specify in advance all of the grounds on which relief may be appropriate.

The fifth modification to the list of specified extraordinary and compelling reasons appears in new subsection (b)(6) ("Unusually Long Sentence") and permits non-retroactive changes in law (other than non-retroactive amendments to the Guidelines Manual) to be considered extraordinary and compelling reasons warranting a sentence reduction, but only in narrowly circumscribed circumstances. Specifically, where (a) the defendant is serving an unusually long sentence; (b) the defendant has served at least ten years of the sentence; and (c) an intervening change in the law has produced a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, the change in law can qualify as an extraordinary and compelling reason after the court has fully considered the defendant's individualized circumstances.

One of the expressed purposes of section 3582(c)(1)(A) when it was enacted in 1984 was to provide a narrow avenue for judicial relief from unusually long sentences. S. REP. NO. 98–225 (1983). Having abolished parole in the interest of certainty in sentencing, Congress recognized the need for such judicial authority. In effect, it replaced opaque Parole Commission review of every federal sentence with a transparent, judicial authority to consider reducing only a narrow subset of sentences—those presenting "extraordinary and compelling" reasons for a reduction.

Subsections (b)(6) and (c) operate together to respond to a circuit split concerning when, if ever, non-retroactive changes in law may be considered as extraordinary and compelling reasons within the meaning of section 3582(c)(1)(A). *Compare United States v. Ruvalcaba*, 26 F.4th 14, 16, 26–28 (1st Cir. 2022) (holding that non-retroactive changes in sentencing law may be considered in light of a defendant's particular circumstances), *United States v. McCoy*, 981 F.3d 271, 286–88 (4th Cir. 2020) (same), *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022) (same), *and United States v. McGee*, 992 F.3d 1035, 1047–48 (10th Cir. 2021) (same), *with United States v. Andrews*, 12 F.4th 255, 260–62 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 1446 (2022) (holding that non-retroactive changes in law are not permissible considerations), *United States v. McMaryion*, 64 F.4th 257, 259–60 (5th Cir. 2023) (same), *United States v.*

McCall, 56 F.4th 1048, 1061 (6th Cir. 2022) (en banc) (same) , *United States v. King*, 40 F.4th 594, 595 (7th Cir. 2022) (same), *United States v. Crandall*, 25 F.4th 582, 585–86 (8th Cir. 2022) (same), *and United States v. Jenkins*, 50 F.4th 1185, 1198, 1198 (D.C. Cir. 2022) (same).

The Commission considered whether the foregoing split among the circuit courts of appeals was properly addressed by the Commission, which typically resolves such disagreements when they relate to its guidelines or policy statements, *see Braxton v. United States*, 500 U.S. 344 (1991), or by the Supreme Court. In making that determination, the Commission was influenced by the fact that on several occasions the Department of Justice successfully opposed Supreme Court review of the issue on the ground that it should be addressed first by the Commission. *See, e.g.*, Brief For the United States in Opposition to Grant of Certiorari, *Jarvis v. United States*, No. 21-568, 2021 WL 5864543 (U.S. Dec. 8, 2021); Memorandum For the United States in Opposition to Grant of Certiorari, *Watford v. United States*, No. 21-551, 2021 WL 5983234 (U.S. Dec. 15, 2021); Memorandum For the United States in Opposition to Grant of Certiorari, *Williams v. United States*, No. 21-767, 2022 WL 217947 (U.S. Jan. 24, 2022); Memorandum For the United States in Opposition to Grant of Certiorari, *Thacker v. United States*, No. 21-877, 2022 WL 467984 (U.S. Feb. 14, 2022).

The amendment agrees with the circuits that authorize a district court to consider non-retroactive changes in the law as extraordinary and compelling circumstances warranting a sentence reduction but adopts a tailored approach that narrowly limits that principle in multiple ways. First, it permits the consideration of such changes only in cases involving "unusually long sentences," which the legislative history to the SRA expressly identified as a context in which sentence reduction authority is needed. *See* S. REP. NO. 98–225, at 55 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3238–39. ("The Committee believes that there may be unusual cases in which the eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defender [sic] was convicted have been later amended to prove a shorter term of imprisonment.")). Second, the change in law itself may be considered an extraordinary and compelling reason only where it would produce a gross disparity between the length of the sentence being served and the sentence likely to be imposed at the time the motion is filed. Finally, to address administrative concerns raised by some commenters, the amendment limits the application of this provision to individuals who have served at least 10 years of the sentence the motion seeks to reduce. Commission data show that between fiscal year 2013 and fiscal year 2022, fewer than 12 percent (11.5%) of all offenders were sentenced to a term of imprisonment of ten years or longer.

Subsection (b)(6) excludes from consideration as extraordinary and compelling reasons warranting a reduction in sentence changes to the *Guidelines Manual* that the Commission has not made retroactive. Public comment requested that the Commission clarify the interaction between §1B1.13 and §1B1.10, and the Commission determined that excluding non-retroactive changes to the guidelines from consideration as extraordinary and compelling reasons was consistent with §1B1.10 and the Supreme Court's decision in *Dillon v. United States*, 560 U.S. 817 (2010).

To more fully address the proper role of changes in law in this context, the amendment also adds a new subsection (c) to the policy statement. Whereas subsection (b)(6) narrowly limits the circumstances in which a non-retroactive change in the law can constitute an extraordinary and compelling reason that itself can warrant a reduction in sentence, subsection (c) of the amended policy statement governs the use of changes in the law in cases where a defendant "otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction." In those circumstances, *all* changes in law, including non-retroactive amendments to the

Guidelines Manual, may properly be considered in determining the extent of a sentencing reduction. For example, a defendant's motion may present the following circumstances: (a) commendable rehabilitation while incarcerated; (b) the offense conduct occurred when the defendant was in his late teens or early twenties; and (c) pursuant to intervening legislation or intervening Guidelines amendments, the sentence likely to be imposed at the time of the motion would be lower than the sentence being served, but not grossly so. In those circumstances, the change in law could not properly be considered an extraordinary and compelling reason warranting a reduction in sentence. However, if the court determines that the combination of the other two factors constitutes an extraordinary and compelling reason, the change in law is among the broad array of factors that may properly be considered in determining the extent of any such reduction. This aspect of the amendment is fully consistent with *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

Finally, the requirements in subsection (b)(6) that the defendant be serving an unusually long sentence and have served at least ten years of such sentence are not applicable to cases not covered by that subsection. Those requirements apply only when a defendant seeks to have a non-retroactive change in law itself be considered an extraordinary and compelling reason warranting a reduction in sentence.

New Application Notes Regarding Interaction with 18 U.S.C. § 3622 and Notification of Victims

The amendment also adds two new application notes to the Commentary to §1B1.13. New Application Note 1 provides that a reduction under this policy statement is not appropriate when temporary release under 18 U.S.C. § 3622 (a furlough granted by the Bureau of Prisons) "adequately addresses" the defendant's circumstances. This new application note responds to public comment, including comment from the Criminal Law Committee for the Judicial Conference of the United States, urging the Commission to clarify that this policy statement is not intended to address temporary medical or family circumstances that a BOP-granted furlough adequately addresses.

New Application Note 2 "encourages the court to make its best effort to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified." Although § 3582(c)(1)(A) does not require a court to conduct a public court proceeding before resolving a motion, and in many cases the passage of time can make victim identification and notification difficult, the Commission encourages the court to make its best effort to notify any victims and, to the extent public court proceedings are held, afford them an opportunity to be heard, unless the victim previously requested not to be notified.

Conforming Changes

Finally, as conforming changes, the amendment deletes Application Notes 4 and 5 and makes a minor technical change to the Background Commentary. Application Note 4 reflected that only the Bureau of Prisons could file a motion under 18 U.S.C. § 3582(c)(1)(A) before the First Step Act and, as such, "encourage[d] the Director of the Bureau of Prisons to file such a motion." Application Note 5 provided that "[a]ny reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement." These two application notes were deleted because a motion by the Director of the Bureau of Prisons is no longer required after the enactment of the First Step Act. The Background Commentary is also amended to reflect that the Commission is

"required," as opposed to "authorized," to "describe what should be considered extraordinary and compelling reasons for sentence reduction."

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 815

AMENDMENT: The Commentary to §2A2.4 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 111" and inserting "18 U.S.C. §§ 40A, 111".

Section 2A5.2 is amended in the heading by striking "Vehicle" and inserting "Vehicle; Unsafe Operation of Unmanned Aircraft".

The Commentary to §2A5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. § 1992(a)(1)" and inserting "18 U.S.C. §§ 39B, 1992(a)(1)".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by striking "7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b)", and inserting "5 U.S.C. §§ 8345a, 8466a; 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 220, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 20 U.S.C. § 1097(a), (b), (d), (e); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b)".

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 215" and inserting "18 U.S.C. §§ 215, 220".

Section 2G1.1(b)(1)(B) is amended by striking "the offense involved fraud or coercion" and inserting "(i) the offense involved fraud or coercion; or (ii) the offense of conviction is 18 U.S.C. § 2421A(b)(2)".

The Commentary to §2G1.1 captioned "Statutory Provisions" is amended by striking "2422(a) (only if the offense involved a victim other than a minor)" and inserting "2421A (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor). For additional statutory provision(s), *see* Appendix A (Statutory Index)".

Section 2G1.3(b) is amended—

in paragraph (3) by striking "increase by 2 levels" and inserting "increase by 2 levels. *Provided*, however, that subsection (b)(3)(B) shall not apply if the offense of conviction is 18 U.S.C. § 2421A";

and in paragraph (4) by striking "If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.", and inserting the following:

"(Apply the greater):

(A) If (i) the offense involved the commission of a sex act or sexual contact; or (ii) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

(B) If (i) subsection (a)(4) applies; and (ii) the offense of conviction is 18 U.S.C. § 2421A(b)(2), increase by 4 levels.".

The Commentary to §2G1.3 captioned "Statutory Provisions" is amended by striking "2422 (only if the offense involved a minor), 2423, 2425" and inserting "2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), *see* Appendix A (Statutory Index)".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by striking "47 U.S.C. § 605" and inserting "44 U.S.C. § 3572; 47 U.S.C. § 605".

The Commentary to §2N1.1 captioned "Statutory Provisions" is amended by striking "18 U.S.C. § 1365(a), (e)" and inserting "18 U.S.C. § 1365(a), (e); 21 U.S.C. § 333(b)(7). For additional statutory provision(s), *see* Appendix A (Statutory Index)".

The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by striking "333(a)(1), (a)(2), (b)" and inserting "333(a)(1), (a)(2), (b)(1)–(6), (b)(8)".

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by striking "5332" and inserting "5332, 5335, 5336".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310." and inserting "10 U.S.C. § 2733a(g)(2); 18 U.S.C. §§ 39B, 1365(f), 1801, 2259(d)(4); 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).".

Appendix A (Statutory Index) is amended—

by inserting before the line referenced to 7 U.S.C. § 6 the following new line references:

"5 U.S.C. § 8345a 2B1.1

5 U.S.C. § 8466a 2B1.1";

by inserting before the line referenced to 12 U.S.C. § 631 the following new line reference:

"10 U.S.C. § 2733a(g)(2) 2X5.2";

by inserting before the line referenced to 18 U.S.C. § 43 the following new line references:

"18 U.S.C. § 39B 2A5.2, 2X5.2

18 U.S.C. § 40A 2A2.4";

by inserting before the line referenced to 18 U.S.C. § 224 the following new line reference:

"18 U.S.C. § 220 2B1.1, 2B4.1";

by inserting before the line referenced to 18 U.S.C. § 2260(a) the following new line reference:

"18 U.S.C. § 2259(d)(4) 2X5.2";

by inserting before the line referenced to 18 U.S.C. § 2320 the following new line reference:

"18 U.S.C. § 2319C 2B5.3";

by inserting before the line referenced to 18 U.S.C. § 2422 the following new line reference:

"18 U.S.C. § 2421A 2G1.1, 2G1.3";

by inserting before the line referenced to 21 U.S.C. § 101 the following new line reference:

"20 U.S.C. § 1097(e) 2B1.1";

by inserting before the line referenced to 21 U.S.C. § 458 the following new line reference:

"21 U.S.C. § 333(b)(8) 2N2.1";

by inserting before the line referenced to 31 U.S.C. § 5363 the following new line references:

"31 U.S.C. § 5335 2S1.3

31 U.S.C. § 5336 2S1.3";

and by inserting before the line referenced to 45 U.S.C. § 359(a) the following new line reference:

"44 U.S.C. § 3572 2H3.1".

REASON FOR AMENDMENT: This multi-part amendment responds to recently enacted legislation.

FDA Reauthorization Act of 2017

First, the amendment amends Appendix A (Statutory Index) to reference a new offense for counterfeit drugs at 21 U.S.C. § 333(b)(8) (Penalties [for violations of the Federal Food, Drug, and Cosmetic Act (FDCA)]) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) in response to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (Aug. 18, 2017). The Act added subsection 333(b)(8), which provides that the statutory maximum term of imprisonment is ten years for a violation of 21 U.S.C. § 331(i)(3) (Prohibited acts [under the FDCA]). Subsection 331(i)(3) prohibits causing a drug to be counterfeited, or making, selling, dispensing, or holding for sale or dispensing, a counterfeit drug. The Commission determined that §2N2.1 is the most appropriate guideline to which to reference this offense because §2N2.1 covers similar penalty provisions at section 333.

Allow States and Victims to Fight Online Sex Trafficking Act

Second, the amendment amends §§2G1.1 (Promoting a Commercial Sex Act or Prohibiting Sexual Conduct with an Individual Other than a Minor) and 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) in response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (Apr. 11, 2017). The Act added a new offense at 18 U.S.C. § 2421A(a) (Promotion or facilitation of prostitution and reckless disregard of sex trafficking) which prohibits owning, managing, or operating an interactive computer service with the intent to promote or facilitate prostitution. Section 2421A has a statutory maximum term of imprisonment of ten years. The Act included an aggravated offense at subsection 2421A(b)(2) if the offender commits an offense under subsection 2421A(a) while acting in reckless disregard of the fact that such conduct contributed to sex trafficking in violation of 18 U.S.C. § 1591(a) (Sex trafficking of children or by force, fraud, or coercion). Offenses under section 1591(a) that involve force, fraud, coercion, or minors have statutory mandatory minimum terms of imprisonment of at least ten years and statutory maximum terms of imprisonment of life. Offenses under subsection 2421A(b)(2) have a 25-year statutory maximum term of imprisonment to reflect the serious nature of the sex trafficking conduct in violation of section 1591(a). To reflect the statutory maximum term of imprisonment at subsection 2421A(b)(2), the amendment amends the 4-level enhancement at §2G1.1(b)(1)(B) and adds a new 4-level enhancement at §2G1.3(b)(4)(B) that apply if the offense of conviction is 18 U.S.C. § 2421A(b)(2). The amendment also amends §2G1.3(b)(3) to provide that §2G1.3(b)(3)(B) shall not apply if the offense of conviction is 18 U.S.C. § 2421A because the use of a computer is already accounted for in the base offense level.

FAA Reauthorization Act of 2018

Third, the amendment amends Appendix A to reference new offenses in the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 5, 2018). The new offense at 18 U.S.C. § 39B (Unsafe operation of unmanned aircraft) is referenced to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Section 39B prohibits the knowing or reckless unsafe operation of drones that interfere with the safe operation of an aircraft carrying one or more persons or operated in close proximity to an airport runway. Section 39B has a statutory maximum term of imprisonment of one year. The statutory maximum term of imprisonment for reckless violations that cause serious bodily injury or death is ten years, and for knowing violations that cause serious bodily injury or death is any term of years or life. The Commission determined that §2A5.2 is the most appropriate guideline to which to reference felony violations of section 39B because it covers conduct interfering with the operation of aircraft. Additionally, providing a reference to §2X5.2 is consistent with Commission practice relating to new misdemeanor offenses.

The FAA Reauthorization Act also added a new offense at 18 U.S.C. § 40A (Operation of unauthorized unmanned aircraft over wildfires) which is referenced in Appendix A to §2A2.4 (Obstructing or Impeding Officers). Section 40A prohibits operating a drone in a manner that interferes with wildfire suppression or with law enforcement or emergency response efforts related to wildfire suppression. Section 40A has a statutory maximum term of imprisonment of two years. The Commission determined that §2A2.4 is the most appropriate guideline to which to reference this offense because it covers conduct involving interfering with and obstructing or impeding officers.

SUPPORT for Patients and Communities Act

Fourth, the amendment amends Appendix A to reference a new offense at 18 U.S.C. § 220 (Illegal remunerations for referrals to recovery homes, clinical treatment facilities, and laboratories) to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) in response to the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act ("the SUPPORT for Patients and Communities Act"), Pub. L. 115–271 (Oct. 24, 2018). Section 220 prohibits soliciting, receiving, paying, or offering any remuneration, including kickbacks, bribes, or rebates, for referring patients to a facility covered by a health care benefit program. Section 220 has a statutory maximum term of imprisonment of ten years. The Commission determined that §§2B1.1 and 2B4.1 are the most appropriate guidelines to which to reference this offense because both guidelines cover conduct involving kickbacks and bribery.

Amy, Vicky, and Andy Child Pornography Victim Assistance Act

Fifth, the amendment amends Appendix A to reference a new offense at 18 U.S.C. § 2259(d) (Mandatory restitution [for child pornography victims]) to §2X5.2 in response to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act, Pub. L. 115–299 (Dec. 7, 2018). Subsection 2259(d) prohibits attorneys from charging fees in excess of 15 percent when representing a child pornography victim who receives "defined monetary assistance" from the Child Pornography Victims Reserve and provides for a statutory maximum term of imprisonment of one year. Providing a reference to §2X5.2 is consistent with Commission practice relating to new misdemeanor offenses.

Foundations for Evidence-Based Policymaking Act

Sixth, the amendment amends Appendix A to reference a new offense at 44 U.S.C. § 3572 (Confidential information protection) to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) in response to the Confidential Information Protection and Statistical Efficiency Act, part of the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (Jan. 14, 2019). Section 3572 prohibits the unauthorized disclosure of information collected by an agency under a pledge of confidentiality for exclusively statistical purposes or using the information for other than statistical purposes. Section 3572 has a statutory maximum term of imprisonment of five years. The Commission determined that §2H3.1 is the most appropriate guideline to which to reference this offense because it covers conduct involving the unauthorized disclosure of information.

National Defense Authorization Act for Fiscal Year 2020

Seventh, the amendment amends Appendix A to reference a new offense at 10 U.S.C. § 2733a (Armed Forces; Medical malpractice claims by members of the uniformed services) to §2X5.2 in response to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (Dec. 20, 2019). Section 2733a prohibits attorneys from charging fees in excess of 20 percent when representing a member of the uniformed services who receives a payment under section 2733a for medical malpractice caused by a health care provider of the Department of Defense. Section 2733a has a statutory maximum term of imprisonment of one year. Providing a reference to §2X5.2 is consistent with Commission practice relating to new misdemeanor offenses.

Representative Payee Fraud Prevention Act

Eighth, the amendment amends Appendix A to reference two new offenses at 5 U.S.C. §§ 8345a (Government Organization and Employees; Embezzlement or conversion of payments)

and 8466a (Embezzlement or conversion of payments) to §2B1.1 in response to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (Mar. 18, 2020). Sections 8345a and 8466a prohibit representative payees of minors or other individuals under a legal disability from embezzling or converting retirement payments under the Civil Service Retirement System or the Federal Employees' Retirement System. The statutory maximum term of imprisonment for both sections is five years. The Commission determined that §2B1.1 is the most appropriate guideline to which to reference these offenses because it covers conduct involving similar financial fraud.

Stop Student Debt Relief Scams Act

Ninth, the amendment amends Appendix A to reference a new offense at 20 U.S.C. § 1097(e) (Education; Student Assistance Programs; Criminal penalties) to §2B1.1 in response to the Stop Student Debt Relief Scams Act of 2019, Pub. L. 116–251 (Dec. 22, 2020). Subsection 1097(e) prohibits the unauthorized use of an access device relating to student assistance programs issued to another or obtained by fraud to access the information technology systems of the Department of Education for commercial advantage or private financial gain. Subsection 1097(e) has a statutory maximum term of imprisonment of five years. The Commission determined that §2B1.1 is the most appropriate guideline to which to reference this offense because §2B1.1 covers other section 1097 offenses prohibiting embezzlement, fraud and false statements involved in student assistance programs.

Protecting Lawful Streaming Act

Tenth, the amendment amends Appendix A to reference a new offense at 18 U.S.C. § 2319C (Illicit digital transmission services) to §2B5.3 (Criminal Infringement of Copyright or Trademark) in response to the Protecting Lawful Streaming Act, part of the 2021 Consolidated Appropriations Act, Pub. L. 116–260 (Dec. 27, 2020). Section 2319C prohibits publicly offering or providing digital transmission services designed to provide the unauthorized transmission of copyrighted works, including pre-release works being prepared for commercial public performance, and provides for a statutory maximum term of imprisonment of three years. The statutory maximum term of imprisonment is five years if the offense involved one or more pre-release works, and for a second or subsequent violation of section 2319C, the statutory maximum term of imprisonment is ten years. The Commission determined that §2B5.3 is the most appropriate guideline to which to reference this offense because it covers conduct involving criminal copyright infringement including pre-release works.

William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

Eleventh, the amendment amends Appendix A to reference multiple new offenses at 31 U.S.C. §§ 5335 (Money and Finance; Concealment of source of assets in monetary transactions) and 5336 (Beneficial ownership information reporting requirements) to §2S1.3 (Structuring Transactions to Evade Reporting Requirement; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instruments Report) in response to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (Jan. 1, 2021).

Subsection 5335(b) prohibits concealing, falsifying, or misrepresenting a material fact from a financial institution about the ownership or control of certain assets over $1,000,000 if the person or entity controlling the assets is a certain foreign figure or associate. Subsection 5335(c) prohibits concealing, falsifying, or misrepresenting a material fact, to or from a financial institution, about the source of funds in monetary transactions involving "primary

money laundering concerns" and that violate the prohibitions prescribed in section 5318A(b)(5). Both subsections 5335(b) and 5335(c) have a statutory maximum term of imprisonment of ten years.

Subsection 5336(h)(1) prohibits willfully providing false or fraudulent beneficial ownership information to the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") in accordance with the reporting requirements in subsection 5336(b). Subsection 5336(h)(1) has a statutory maximum term of imprisonment of two years. Subsection 5336(c)(4) prohibits employees and officers of any requesting agency from violating the protocols established by the Secretary of the Treasury or the unauthorized disclosure or use of the beneficial ownership information submitted to FinCEN. Subsection 5336(h)(2) prohibits any person from knowingly disclosing or using beneficial ownership information obtained through a report submitted to, or through a disclosure made by, FinCEN, without authorization. Both subsections 5336(c)(4) and 5336(h)(2) have a statutory maximum term of imprisonment of five years. The statutory maximum term of imprisonment for a violation of subsection 5336(c)(4) or 5336(h)(2) is ten years if the offense was committed while violating another law of the United States or as part of a pattern of certain unlawful activities.

The Commission determined that §2S1.3 is the most appropriate guideline to which to reference these new offenses because it covers similar conduct involving structuring financial transactions and requiring the filing of a Currency Transaction Report regarding payment, receipt, or transfer of United States coins or currency.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 816

AMENDMENT: Section 2A3.3 is amended—

in the heading by striking "Acts" and inserting "Acts; Criminal Sexual Abuse of an Individual in Federal Custody".

in subsection (a) by striking "14" and inserting "18";

and by inserting at the end the following new subsection (c):

"(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the victim.".

The Commentary to §2A3.3 captioned "Statutory Provision" is amended by striking "§ 2243(b)" and inserting "§§ 2243(b), 2243(c)".

The Commentary to §2H1.1 captioned "Statutory Provisions" is amended by striking "246, 247, 248, 249" and inserting "246–250".

Appendix A (Statutory Index) is amended—

by inserting before the line referenced to 18 U.S.C. § 281 the following new line reference:

"18 U.S.C. § 250 2H1.1";

and by inserting before the line referenced to 18 U.S.C. § 2244 the following new line reference:

"18 U.S.C. § 2243(c) 2A3.3".

REASON FOR AMENDMENT: This multi-part amendment responds to statutory changes provided in division W, title XII, of the Violence Against Women Act Reauthorization Act, Pub. L. 117–103 (Nov. 9, 2022) and separately addresses concerns regarding cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision.

First, the amendment amends Appendix A (Statutory Appendix) to reference the new offense created at 18 U.S.C. § 250 (Penalties for civil rights offenses involving sexual misconduct) to §2H1.1 (Offenses Involving Individual Rights). New section 250 criminalizes engaging in or causing another to engage in sexual misconduct while committing any civil rights offense under chapter 13 (Civil Rights) of title 18, U.S. Code, or 42 U.S.C. § 3631 (Fair Housing [violations]). Section 250 delineates different degrees of prohibited sexual misconduct, including aggravated sexual abuse as defined in 18 U.S.C. § 2241 (Aggravated sexual abuse), sexual abuse as defined in 18 U.S.C. § 2242 (Sexual abuse), a sexual act not amounting to aggravated sexual abuse or sexual abuse, and sexual contact, as defined in 18 U.S.C. § 2244 (Abusive sexual contact). The statutory maximum term of imprisonment for a violation of section 250 ranges from two years to any term of years or life, depending on the sexual conduct involved in the offense.

The Commission determined that §2H1.1 is the most appropriate guideline to which to reference this new offense. Other similar offenses are referenced to this guideline. In addition, the Commission concluded that the alternative base offense levels provided in §2H1.1 effectively address both the broad array of conduct criminalized under this new statute and the varying statutory maximum terms of imprisonment applicable to such conduct.

Second, the amendment amends Appendix A to reference new subsection (c) at 18 U.S.C. § 2243 (Sexual abuse of a minor, a ward, or an individual in Federal custody) to §2A3.3 and makes a conforming change to §2A3.3's title. The new subsection at 18 U.S.C. § 2243 prohibits law enforcement officers from knowingly engaging in a sexual act with an individual under arrest or supervision, in detention, or in federal custody. The Commission determined §2A3.3 is the most appropriate guideline to which to reference the new offense because it covers a similar offense at 18 U.S.C. § 2243(b) prohibiting anyone in a federal prison, institution, or facility from knowingly engaging in a sexual act with a ward, defined as an inmate or other person in official detention and under the custodial, supervisory, or disciplinary authority of the person engaging in the act. Subsection 2243(b) also has the same 15-year statutory maximum term of imprisonment, and a reference to this guideline will result in similar penalties for both subsections of section 2243.

Finally, the amendment increases the base offense level at §2A3.3 for offenses involving the sexual abuse of a ward or an individual in federal custody from 14 to 18. The Commission determined that the increased base offense level will more appropriately reflect the 15-year statutory maximum penalty for offenses referenced to this guideline and punish the serious sexual conduct involved in these offenses. In promulgating the amendment, the Commission was informed by both the rate and extent of above-range sentences in these cases. While the

average guideline minimum in fiscal years 2018 through 2022 was 17 months (median 12 months), the average sentence imposed was more than double, at 35 months (median 15 months).

The Commission also concluded that an increased guideline range for §2A3.3 offenses would be more proportional to the guideline range at §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) for the sexual abuse of minors over the age of 12 and under the age of 16 years, conduct prohibited by 18 U.S.C. § 2243(a) with the same 15-year statutory maximum term of imprisonment as subsections 2243(b) and 2243(c). Section 2A3.2 has a base offense level 18 and a 4-level enhancement if the victim is in the care, custody, or supervisory control of the defendant.

Consistent with this approach, the amendment also amends §2A3.3 to include the same cross reference currently provided for in §2A3.2 in order to ensure proportional guideline ranges for all section 2243 offenses when the offense involved aggravating sexual conduct. The new cross reference sends cases to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), and further directs that §2A3.1 shall apply if the victim had not attained the age of 12 years, regardless of the "consent" of the victim.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 817

AMENDMENT: Section 2D1.1(a) is amended—

in paragraph (1) by striking the following:

"43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or",

and inserting the following:

"43, if—

(A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or";

and in paragraph (3) by striking "similar offense" and inserting "felony drug offense".

Section 2D1.1(b)(18) is amended by striking "subdivisions" and inserting "paragraphs".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

by striking Note 2 as follows:

"2. *'Plant'*.—For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).";

by redesignating Note 1 as Note 2;

by inserting before Note 2 (as so redesignated) the following new Note 1:

"1. *Definitions*.—

For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

For purposes of subsection (a), 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' have the meaning given those terms in 21 U.S.C. § 802.";

and in Note 21 by striking "a minimum offense level of level 17" and inserting "that the applicable guideline range shall not be less than 24 to 30 months of imprisonment".

Section 2D1.11(b)(6) is amended by striking "subdivisions" and inserting "paragraphs".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 7 by striking "a minimum offense level of level 17" and inserting "an applicable guideline range of not less than 24 to 30 months of imprisonment".

Section 4A1.3(b)(3)(B) is amended—

in the heading by striking "*to Category I*";

by striking "whose criminal history category is Category I after receipt of" and inserting "who receives";

by striking "criterion" and inserting "criminal history requirement";

and by striking "if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category)" and inserting "if the defendant did not otherwise meet such requirement before receipt of the downward departure".

Section 5C1.2(a) is amended—

by inserting after "§ 963," the following: "or 46 U.S.C. § 70503 or § 70506,";

by striking "set forth below" and inserting "as follows";

and by striking paragraph (1) as follows:

"(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);",

and inserting the following new paragraph (1):

"(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;".

Section 5C1.2(b) is amended by striking "the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall not be less than 17" and inserting "the applicable guideline range shall not be less than 24 to 30 months of imprisonment".

The Commentary to §5C1.2 captioned "Application Notes" is amended—

by striking Notes 1, 2, and 3 as follows:

"1. 'More than 1 criminal history point, as determined under the sentencing guidelines,' as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

2. 'Dangerous weapon' and 'firearm,' as used in subsection (a)(2), and 'serious bodily injury,' as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

3. 'Offense,' as used in subsection (a)(2)–(4), and 'offense or offenses that were part of the same course of conduct or of a common scheme or plan,' as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.";

by inserting the following new Note 1:

"1. *Definitions*.—

(A) The term 'violent offense' means a 'crime of violence,' as defined in 18 U.S.C. § 16, that is punishable by imprisonment.

(B) 'Dangerous weapon' and 'firearm,' as used in subsection (a)(2), and 'serious bodily injury,' as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

(C) 'Offense,' as used in subsection (a)(2)–(4), and 'offense or offenses that were part of the same course of conduct or of a common scheme or plan,' as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.";

by redesignating Note 4 as Note 2;

in Note 2 (as so redesignated) by inserting at the beginning the following new heading: "*Application of subsection (a)(2).*—";

by striking Notes 5, 6, and 7 as follows:

"5. 'Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines,' as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

6. 'Engaged in a continuing criminal enterprise,' as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who 'engaged in a continuing criminal enterprise' but is convicted of an offense to which this section applies will be an 'organizer, leader, manager, or supervisor of others in the offense.'

7. Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.";

by inserting the following new Notes 3 and 4:

"3. *Application of Subsection (a)(4).*—

(A) *'Organizer, leader, manager, or supervisor of others in the offense'.*—The first prong of subsection (a)(4) requires that the defendant was not subject to an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

(B) *'Engaged in a continuing criminal enterprise'.*—'Engaged in a continuing criminal enterprise,' as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who 'engaged in a continuing criminal enterprise' but is convicted of an offense to which this section applies will be an 'organizer, leader, manager, or supervisor of others in the offense.'

4. *Use of Information Disclosed under Subsection (a).*—Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).";

by redesignating Notes 8 and 9 as Notes 5 and 6, respectively;

in Note 5 (as so redesignated) by inserting at the beginning the following new heading: "*Government's Opportunity to Make Recommendation.*—";

and in Note 6 (as so redesignated) by inserting at the beginning the following new heading: "*Exemption from Otherwise Applicable Statutory Minimum Sentences.*—".

The Commentary to §5C1.2 captioned "Background" is amended by inserting after "Violent Crime Control and Law Enforcement Act of 1994" the following: "and subsequently amended".

REASON FOR AMENDMENT: This two-part amendment revises §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and subsections (a)(1) and (a)(3) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession

with Intent to Commit These Offenses); Attempt or Conspiracy) in response to the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018) ("First Step Act"). The First Step Act amended the eligibility criteria of the "safety valve" provision at 18 U.S.C. § 3553(f) and the enhanced penalty provisions for certain drug trafficking defendants at 21 U.S.C. §§ 841(b) and 960(b). The amendment primarily revises §5C1.2 to conform it to the statutory safety valve, as amended by the First Step Act. In addition, the amendment revises subsections (a)(1) and (a)(3) of §2D1.1 to make the guideline's reference to the type of prior offenses that trigger enhanced mandatory minimum penalties consistent with the amended statutory provisions.

First, the amendment makes three changes to §5C1.2 and its corresponding commentary to reflect the statutory changes to section 3553(f) made by the First Step Act. The First Step Act expanded the safety valve provision at section 3553(f) by extending its applicability to defendants convicted of maritime offenses (46 U.S.C. §§ 70503 and 70506) and broadening the criminal history eligibility criteria to include defendants who do not have: (1) "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines"; (2) a "prior 3-point offense, as determined under the sentencing guidelines"; and (3) a "prior 2-point violent offense, as determined under the sentencing guidelines." The amendment revises §5C1.2(a) to include maritime offenses and the expanded statutory criminal history criteria. Next, it revises Application Note 1 to incorporate the statutory definition for the term "violent offense." Finally, it revises Application Note 7 to reflect the new statutory limitation that information disclosed by a defendant pursuant to 18 U.S.C. § 3553(f) "may not be used to enhance the defendant's sentence unless the information relates to a violent offense."

Second, the amendment revises §5C1.2(b) to account for the expanded class of defendants who qualify for safety valve relief. Section 5C1.2(b) implemented Congress's directive requiring that the guideline minimum be at least 24 months for defendants whose statutorily required minimum sentence was at least five years by providing a minimum offense level of 17 for such offenders. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–222, § 80001(b), 108 Stat. 1796, 1985 (1994) ("In the case of a defendant for whom the statutorily required minimum sentence is 5 years, such guidelines and amendments to guidelines . . . shall call for a guideline range in which the lowest term of imprisonment is at least 24 months."); *see also* USSG App. C, amend. 624 (effective Nov. 1, 2001) (adding §5C1.2(b) "in order to comply more strictly with the directive"). Before the First Step Act, only defendants in Criminal History Category (CHC) I (with no more than one criminal history point) could qualify for safety valve relief, and a base offense level of 17 therefore correlated with a guideline range of 24 to 30 months for all safety-valve-eligible defendants. After the First Step Act, a safety-valve-eligible defendant can be in any CHC, and an offense level of 17 correlates with the following guideline ranges at each category: I (24–30 months); II (27–33); III (30–37); IV (37–46); V (46–57); and VI (51–63). Because Congress's directive is tied to the existence of a 5-year mandatory minimum penalty and not to the defendant's CHC, the amendment replaces the offense-level floor with a guideline-range floor. The Commission determined that the proportionality concerns raised in public comment and testimony are addressed by the operation of the Sentencing Table, irrespective of the offense-level floor.

Third, the amendment makes conforming changes to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), which references the number of criminal history points permitted under §5C1.2(a)(1).

Fourth, the amendment makes only non-substantive changes to §2D1.1(b)(18) and §2D1.11(b)(6), the 2-level reductions that are tethered to the eligibility criteria of paragraphs (1)–(5) of §5C1.2(a). The 2-level reductions in §2D1.1 and §2D1.11 apply to any defendant who meets the revised criteria of §5C1.2.

Finally, the amendment revises subsections (a)(1) and (a)(3) of §2D1.1 to replace the term "similar offense" with the appropriate terms set forth in the relevant statutory provisions, as amended by the First Step Act.

The penalty provisions at 21 U.S.C. §§ 841(b) and 960(b) provide enhanced mandatory minimum penalties for defendants (1) whose instant offense resulted in death or serious bodily injury or (2) who have prior convictions for certain specified offenses. Penalties are further increased if death or serious bodily injury occurred as a result of the instant offense *and* the defendant has a qualifying prior conviction. Prior to the First Step Act, all of the recidivist penalty provisions within sections 841(b) and 960(b) provided for an enhanced mandatory minimum penalty if a defendant had one or more convictions for a prior "felony drug offense," as defined in 21 U.S.C. § 802(44). The First Step Act both narrowed and expanded the type of prior offenses that trigger enhanced mandatory minimum penalties under 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2) by replacing the term "felony drug offense" with "serious drug felony," as defined in 21 U.S.C. § 802(57), and adding "serious violent felony" offenses, as defined in 21 U.S.C. § 802(58). The First Step Act did not amend 21 U.S.C. §§ 841(b)(1)(C), 841(b)(1)(E), 960(b)(3), or 960(b)(5), which still provide for enhanced mandatory minimum penalties if a defendant was convicted of a prior "felony drug offense."

The enhanced statutory penalty structure is accounted for through heightened alternative base offense levels (BOL) at §2D1.1(a)(1)–(a)(4). Prior to the amendment, §2D1.1(a)(1) provided for a BOL of 43 "if the defendant is convicted under [any of six enumerated subsections], and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions *for a similar offense*." Subsection 2D1.1(a)(3) is identical to §2D1.1(a)(1), except that it provides a BOL of 30 and applies if the defendant is convicted of an offense involving a Schedule III controlled substance under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5).

The First Step Act amended four of the six penalty provisions referenced in §2D1.1(a)(1) and, for those amended provisions, the term "similar offense" is over-inclusive, because it includes drug offenses that do not meet the definition of "serious drug felony," and under-inclusive, because it fails to account for a prior "serious violent felony." The amendment divides §2D1.1(a)(1) into two subparagraphs, (A) and (B). Subparagraph (A), which references the four statutory provisions amended by the First Step Act, replaces the term "similar offense" with "serious drug felony or serious violent felony." Subparagraph (B), which references the two provisions that were not amended, replaces the term "similar offense" with "felony drug offense." The amendment also amends §2D1.1(a)(3), by replacing the term "similar offense" with "felony drug offense," for consistency with the terminology used in §2D1.1(a)(1).

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 818

AMENDMENT: Section 2D1.1(b)(13) is amended—

by inserting after "defendant" the following: "(A)";

and by inserting after "4 levels" the following: "; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the

legitimately manufactured drug, increase by 2 levels. The term 'drug,' as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1)".

REASON FOR AMENDMENT: This amendment revises subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to add a new subparagraph (B) with an alternative 2-level enhancement for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. The new subparagraph (B) refers to 21 U.S.C. § 321(g)(1) to define the term "drug."

Since §2D1.1(b)(13)'s initial promulgation in 2018, the distribution of fentanyl and fentanyl analogues has dramatically increased. The Drug Enforcement Administration reported a substantial increase in the seizure of fake prescription pills, seizing over 50.6 million in calendar year 2022, with 70 percent containing fentanyl. Of those seized pills containing fentanyl, six out of ten contained a potentially lethal dose of the substance, according to lab testing. Additionally, the Centers for Disease Control and Prevention (CDC) estimates there were 107,622 drug overdose deaths in the United States in 2021, an increase of nearly 15 percent from the 93,655 deaths estimated in 2020. The CDC attributes 80,816 of the drug overdose deaths in 2021 to synthetic opioids, primarily fentanyl.

Commission data also indicates an increase in fentanyl and fentanyl analogue offenses, with fentanyl supplanting other drug types, such as crack cocaine and heroin, to become the third most prevalent primary drug (12.6%) among federal drug offenses in fiscal year 2022. In fiscal year 2017, 166 offenders were held accountable for fentanyl or fentanyl analogues. By fiscal year 2022, the number of offenders increased to 2,511 offenders.

The new alternative 2-level enhancement reflects the increased culpability of an individual who acted with willful blindness or conscious avoidance of knowledge that the substance the individual represented or marketed as a legitimately manufactured drug contained fentanyl or a fentanyl analogue. The Commission determined that the "willful blindness" and "conscious avoidance" doctrines are "well established in criminal law," as recognized by the Supreme Court. *See Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). While appellate courts articulate the "willful blindness" or "conscious avoidance" doctrines slightly differently, the requirement makes clear that the government bears the burden to prove by a preponderance of the evidence that the enhancement applies based on the subjective belief and deliberate action of the defendant committing the offense.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 819

AMENDMENT: Section 2K2.1(a)(4)(B) is amended by inserting after "18 U.S.C. § 922(d)" the following: ", § 932, or § 933".

Section 2K2.1(a)(6)(B) is amended by inserting after "18 U.S.C. § 922(d)" the following: ", § 932, or § 933".

Section 2K2.1(b) is amended—

in paragraph (4) by striking "If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels" and inserting "If (A) any firearm was stolen, increase by 2 levels; or (B)(i) any firearm had an altered or obliterated serial number; or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, increase by 4 levels";

in paragraph (5) by striking "If the defendant engaged in the trafficking of firearms, increase by 4 levels." and inserting the following:

"(Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by 2 levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by 2 levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms as a result of inducing the conduct described in clause (i), increase by 5 levels.

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).";

and by inserting at the end the following new paragraphs (8) and (9):

"(8) If the defendant—

(A) receives an enhancement under subsection (b)(5); and

(B) committed the offense in connection with the defendant's participation in a group, club, organization, or association of five or more persons, knowing or acting with willful blindness or conscious avoidance of knowledge that the group, club, organization, or association had as one of its primary purposes the commission of criminal offenses;

increase by 2 levels.

(9) If the defendant—

(A) receives an enhancement under subsection (b)(5);

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or (ii) was unusually vulnerable to being persuaded or induced to commit the offense due to a physical or mental condition;

decrease by 2 levels.".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by inserting after "(k)–(o)," the following: "932, 933,".

The Commentary to §2K2.1 captioned "Application Notes" is amended—

in Note 3 by striking "subsections (a)(4)(B) and (a)(6)" and inserting "subsections (a)(4)(B), (a)(6), and (b)(5)";

in Note 8(A)—

in the first paragraph by striking "However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B)" and inserting "However, if the offense involved a firearm with an altered or obliterated serial number, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii)";

and by striking the second paragraph as follows:

"Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).",

and inserting the following paragraph:

"Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)(i). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of

the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (B)(ii).";

in Note 8(B) by striking the following:

"*Knowledge or Reason to Believe*.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.",

and inserting the following:

"*Defendant's State of Mind*.—Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.";

in Note 10 by striking "subsection (a)(1) and (a)(2)" and inserting "subsections (a)(1) and (a)(2)";

in Note 13—

by striking paragraph (A) as follows:

"(A) *In General*.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.";

by redesignating paragraphs (B), (C), and (D) as paragraphs (A), (B), and (C), respectively;

in paragraph (A) (as so redesignated) by striking the following paragraphs:

" 'Individual whose possession or receipt of the firearm would be unlawful' means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. 'Crime of violence' and 'controlled substance offense' have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). 'Misdemeanor crime of domestic violence' has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term 'defendant', consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.",

and inserting the following paragraphs:

"'Crime of violence' and 'controlled substance offense' have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Misdemeanor crime of domestic violence' has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term 'criminal justice sentence' includes probation, parole, supervised release, imprisonment, work release, or escape status.

The term 'defendant,' consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.";

and in paragraph (B) (as so redesignated) by striking "If the defendant trafficked substantially more than 25 firearms" and inserting "If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms";

and by striking Note 15 as follows:

"15. *Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).*—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.".

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 956 the following new line references:

"18 U.S.C. § 932	2K2.1
18 U.S.C. § 933	2K2.1".

REASON FOR AMENDMENT: This multi-part amendment responds to the directive in section 12004(a)(5) of the Bipartisan Safer Communities Act, Pub. L. No. 117-159 (the "Act"), addresses new offenses and other changes in law made by the Act, and revises the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), to account for firearms that are not marked with a serial number. In the Act, Congress directed that the Commission:

> shall review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect

> the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.

Pub. L. 117-159, §12004(a)(5), 136 Stat. 1313, 1328 (2022).

New Straw Purchase and Firearms Trafficking Offenses

The amendment makes two changes to account for the new offenses at 18 U.S.C. §§ 932 and 933 established by the Act. First, the amendment amends Appendix A (Statutory Index) to reference the new offenses to §2K2.1. Section 12004(a)(1) of the Act makes it unlawful to engage in straw purchasing of firearms (18 U.S.C. § 932) or trafficking in firearms (18 U.S.C. § 933). Sections 932 and 933 both carry statutory maximum sentences of 15 years of imprisonment. 18 U.S.C. §§ 932(c)(1), 933(b). The statutory maximum in section 932 increases to 25 years where the defendant has reasonable cause to believe the firearm would be used to commit a felony or certain other offenses. 18 U.S.C. § 932(c)(2). As both offenses address conduct that is analogous to other firearms offenses, the Commission determined that the most appropriate guideline is §2K2.1.

Second, the amendment revises §2K2.1 to set the base offense level for defendants convicted of these crimes at level 14, or level 20 if the offense involved either a semiautomatic firearm that is capable of accepting a large capacity magazine or a firearm described in 26 U.S.C. § 5845(a). The Commission set these base offense levels to the same levels applicable to defendants convicted under a third statute used to prosecute straw purchasers and traffickers with the same 15-year statutory maximum, 18 U.S.C. § 922(d), to ensure proportionality.

Increase Penalties for Straw Purchasing and Trafficking Offenses

The amendment next revises §2K2.1 to respond to section 12004(a)(5) of the Act, which directs the Commission to provide increased penalties for defendants convicted under 18 U.S.C. § 932, 18 U.S.C. § 933, or "other offenses applicable to the straw purchases and trafficking of firearms." Specifically, the amendment revises the existing "trafficking" specific offense characteristic at §2K2.1(b)(5).

Prior to the amendment, subsection (b)(5) provided an enhancement of four levels "[i]f the defendant engaged in the trafficking of firearms." Application Note 13(A) provided that this enhancement applied if the defendant transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual, whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. Application Note 13(B) defined a person whose possession or receipt would be unlawful as an individual who (i) had a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

The amendment revises subsection (b)(5) in three ways to comply with Congress's directive to include an increase for all defendants convicted under 18 U.S.C. § 932, 18 U.S.C. § 933, or other offenses involving straw purchasing or trafficking of firearms.

First, the amendment creates a new subsection, §2K2.1(b)(5)(A), which provides a 2-level enhancement for defendants convicted of illegally receiving a firearm under 18 U.S.C. § 933(a)(2) (the trafficking receipt provision) or § 933(a)(3) (attempting/conspiring to violate section 933). This ensures that receipt-only defendants convicted under section 933 receive the requisite increase.

Second, the amendment creates a new subsection, §2K2.1(b)(5)(B), which provides a 2-level enhancement for any defendant engaged in straw purchasing or trafficking. This provision incorporates the elements of the straw purchasing and firearms trafficking statutes, including 18 U.S.C. § 922(d), § 932, and § 933(a)(1), to provide an increase for defendants who attempted, conspired, or engaged in conduct involving the illicit transfer of a firearm or ammunition but who would not have received the trafficking enhancement prior to the amendment because of the limiting criteria in the existing Application Note 13. Those criteria included trafficking two or more firearms and that the recipient have criminal convictions for specified crimes.

Third, the amendment revises the criteria previously set forth in Application Notes 13(A) and (B) and incorporates the criteria into subsection (b)(5)(C). New subsection (b)(5)(C) provides an increase for defendants who attempted, conspired, or engaged in conduct involving the illicit transfer of two or more firearms to a person who (i) had a prior conviction of a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (ii) was under a criminal justice sentence at the time of the offense; or (iii) intended to use or dispose of the firearms unlawfully. The new subsection (b)(5)(C) increases the enhancement from four levels to five levels to ensure straw purchasers and firearms traffickers meeting these criteria receive increased penalties as required by the directive.

The Commission determined that the expanded specific offense characteristic at subsection (b)(5) fully implements the directive by ensuring that defendants who illegally transfer a firearm receive an increased penalty under the guidelines. Specifically, the enhancement is tailored to apply to the most culpable defendants who engage in (a) straw purchasing, including those defendants who induce straw purchasing, and (b) firearms trafficking, including those defendants whose conduct was "upstream" in the gun trafficking pipeline. Consistent with the legislative history of the Act, public comment, and witness testimony, the Commission determined that such an increase is appropriate to reflect Congress's view that such conduct contributes to the illegal flow of firearms and that such defendants are currently under-punished as compared to felons in possession of the trafficked weapons. At the same time, by incorporating the elements of the core straw purchasing and firearms trafficking statutes, including the new offenses (sections 932 and 933), the new enhancement narrowly targets such defendants without also impacting other firearms defendants who were not intended to receive an increase.

The amendment also makes two conforming changes. First, to conform with statutory changes in 18 U.S.C. § 921(a)(33), the amended subsection (b)(5)(C) includes a proviso that the enhancement does not apply by reason of the transferee's prior misdemeanor crime of domestic violence where the transferee's rights were restored. Second, the amendment amends the upward departure provision in Application Note 13(B) to conform the language with the revised subsection (b)(5).

Increase Penalties for Organized Crime

The amendment next amends §2K2.1 to respond to section 12004(a)(5) of the Act, which directs the Commission to increase penalties for defendants convicted under 18 U.S.C. § 932 or § 933 who are affiliated with organized crime. The amendment implements this portion of the directive by creating a new specific offense characteristic providing for a 2-level enhancement under §2K2.1(b)(8). Section 2K2.1(b)(8) applies to those defendants who receive an increase at

subsection (b)(5) and who committed the offense in connection with the defendant's participation in an organization of five or more persons, knowing, or acting with willful blindness or conscious avoidance of knowledge, that the organization has as one of its primary purposes the commission of criminal offenses.

To ensure that a defendant would not receive the enhancement based solely on evidence unrelated to the criminal act or mere inclusion in gang databases, the enhancement requires that the defendant committed the offense "in connection with" the defendant's "participation" in a criminal organization, and that the defendant knew or consciously avoided knowledge of the criminal nature of the organization's activities. As with other amendments this year, the Commission determined that the doctrines of "willful blindness" and "conscious avoidance" are "well established in criminal law." *See Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 769 (2011) (noting that, while the Courts of Appeals articulate the "willful blindness" or "conscious avoidance" doctrines slightly differently, "[the Courts of Appeals] all appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.").

Finally, the Commission determined that a 2-level increase for defendants receiving this enhancement is appropriate because specific offense characteristics accounting for other aggravating factors, such as the number of firearms and the use or possession of any firearm or ammunition in connection with another felony offense, may also apply to gang-affiliated defendants in addition to the new enhancement at subsection (b)(8). Accordingly, the Commission determined that an incremental 2-level enhancement appropriately and adequately differentiates straw purchasing and firearms trafficking defendants affiliated with organized crime from those who are unaffiliated.

Reduction for Mitigating Circumstances

The amendment amends §2K2.1 to respond to section 12004(a)(5) of the Act, which directs the Commission to consider an amendment accounting for straw purchasers with mitigating circumstances. The amendment implements this portion of the directive by creating a new specific offense characteristic at §2K2.1(b)(9) providing a 2-level reduction available to defendants who receive an increase at subsection (b)(5) and satisfy other eligibility criteria. The amendment also deletes Application Note 15, which provided for a downward departure for certain straw purchasers, because subsection (b)(9) provides a reduction with broader criteria.

Consistent with congressional intent that the reduction apply to straw purchasers without significant criminal histories, a defendant must have no more than 1 criminal history point to qualify for the specific offense characteristic. Also consistent with congressional intent that the Commission account for mitigating circumstances, the adjustment applies to a defendant motivated by an intimate or familial relationship or by threats or fear who was otherwise unlikely to commit such an offense, or to a defendant who was unusually vulnerable due to physical or mental conditions. The Commission determined that such qualifiers appropriately ensure that the reduction is not so broad as to include highly culpable defendants, while also ensuring it is not so narrow as to exclude the less culpable defendants.

Similarly, the Commission determined that a 2-level reduction is appropriate to ensure that the magnitude of the reduction matches the magnitude of the increase provided in subsections (b)(5)(A) and (B) so that qualifying defendants do not receive increased penalties as a result of the amendment taken as a whole.

Firearms Not Marked with a Serial Number

Finally, the amendment amends §2K2.1 to account for privately made firearms not marked with a serial number, commonly referred to as "ghost guns." The amendment provides a 4-level enhancement if the defendant knew that the offense involved a firearm not marked with a serial number, or the defendant was willfully blind or consciously avoided knowing this fact.

In adding the enhancement, the Commission concluded that there is no meaningful distinction between a firearm with an obliterated serial number, which has long-triggered a 4-level enhancement under §2K2.1(b)(4), and a firearm that is not marked with a serial number. The Commission also concluded that firearms not marked with a serial number share the traits that led the Commission to implement a 4-level enhancement for firearms with altered or obliterated serial numbers: "difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons." USSG App. C, amend. 691 (effective Nov. 1, 2006). Specifically, the Commission shared concerns raised by the Department of Justice regarding the proliferation of ghost guns, the increased frequency with which ghost guns are used in connection with criminal activity, and the difficulty in tracing these firearms. Therefore, the Commission concluded that the same 4-level enhancement applied in offenses involving an altered or obliterated serial number is also appropriate for firearms not marked with a serial number.

The Commission determined that the enhancement should apply only to those defendants who knew or consciously avoided knowing that the firearm was not marked with a serial number. The amendment also specifically excepts firearms manufactured before the effective date of the Gun Control Act of 1968, which imposed the requirement that federal firearms licensees serialize newly manufactured or imported firearms.

The amendment also makes conforming changes to Application Note 8.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 820

AMENDMENT: Section 3E1.1(b) is amended by inserting after "1 additional level." the following: "The term 'preparing for trial' means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. 'Preparing for trial' is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered 'preparing for trial' under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered 'preparing for trial.'".

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6 by striking "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.".

REASON FOR AMENDMENT: This amendment responds to circuit conflicts over whether a reduction under subsection (b) of §3E1.1 (Acceptance of Responsibility), which requires a motion from the government, may be withheld or denied if a defendant moves to suppress evidence or raises sentencing challenges. The amendment addresses the circuit conflicts by providing a definition of the term "preparing for trial," which appears in §3E1.1(b) and Application Note 6

to §3E1.1. The amendment also deletes hortatory language that the Commission previously added to Application Note 6 providing that the "government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." *See* USSG App. C, amend. 775 (effective Nov. 1, 2013).

The amendment defines "preparing for trial" as "substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial." The amendment further provides examples of actions that ordinarily indicate preparing for trial (such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witnesses and exhibit lists). The amendment further provides that preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered preparing for trial, and that post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered preparing for trial.

As Justices Sotomayor and Gorsuch observed in 2021, the conflict as to whether a suppression hearing is a valid basis for denying a §3E1.1(b) reduction is both longstanding and has a potentially significant impact on defendants. *See Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., with whom Gorsuch, J. joins, respecting the denial of certiorari, "emphasiz[ing] the need for clarification from the Commission" on this "important and longstanding split among the Courts of Appeals over the proper interpretation of § 3E1.1(b)"). Three circuits (the Third, Fifth, and Sixth Circuits) have permitted the government to withhold a §3E1.1(b) motion based on a suppression motion, while five circuits (the First, Second, Ninth, Tenth, and D.C. Circuits) have held that a reduction may not be denied based on a suppression motion. *Compare United States v. Longoria*, 958 F.3d 372 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 978 (2021), *United States v. Collins*, 683 F.3d 697 (6th Cir. 2012), and *United States v. Drennon*, 516 F.3d 160 (3d Cir. 2008), *with United States v. Vargas*, 961 F.3d 566 (2d Cir. 2020), *United States v. Price*, 409 F.3d 436 (D.C. Cir. 2005), *United States v. Marquez*, 337 F.3d 1203 (10th Cir. 2003), *United States v. Marroquin*, 136 F.3d 220 (1st Cir. 1998), and *United States v. Kimple*, 27 F.3d 1409 (9th Cir. 1994).

Similarly, the First, Third, Seventh, and Eighth Circuits have held that the government may withhold a §3E1.1(b) motion based on sentencing challenges, while the Second and Fifth Circuits have held that it may not. *Compare United States v. Adair*, 38 F.4th 341 (3d Cir. 2022), *United States v. Jordan*, 877 F.3d 391 (8th Cir. 2017), *United States v. Sainz-Preciado*, 566 F.3d 708 (7th Cir. 2009), and *United States v. Beatty*, 538 F.3d 8 (1st Cir. 2008), *with United States v. Castillo*, 779 F.3d 318 (5th Cir. 2015), and *United States v. Lee*, 653 F.3d 170 (2d Cir. 2011).

These conflicts have resulted in variation in §3E1.1(b) motion practice across—and even within—judicial districts. In some jurisdictions, defendants receive the additional reduction as a matter of course, even if they assert pre-trial or post-conviction challenges. In others, the §3E1.1(b) motion has been withheld based on motions to suppress, sentencing challenges, or other grounds. Because the sentencing impact of losing one additional level under §3E1.1(b) can be significant, the practice in the latter districts has had a chilling effect, deterring defendants from pursuing certain evidentiary and sentencing challenges.

The Commission promulgated this amendment to decrease variation between jurisdictions in applying §3E1.1(b). The amendment also aims to minimize any deterrent effect on defendants' ability to exercise their constitutional rights. *See also* §3E1.1, comment. (n.2) (allowing consideration for the adjustment where a defendant exercises constitutional rights to trial to raise a constitutional challenge to a statute or challenge the applicability of a statute to the defendant's conduct).

In promulgating this amendment, the Commission recognizes that these circuit conflicts involve guideline and commentary provisions that Congress directly amended, and that Congress also directed the Commission not to "alter or repeal" the congressional amendments. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21, § 401(g), (j)(4), 117 Stat. 650. In recognition of this limitation, the amendment defines a term that the congressional amendments did not define—"preparing for trial"—without altering or repealing the amendments that Congress made.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 821

AMENDMENT:

Part A (Status Points under §4A1.1)

The Commentary to §2P1.1 captioned "Application Notes" is amended in Note 5 by striking "§4A1.1(d)" and inserting "§4A1.1(e)".

Section 4A1.1 is amended—

by striking subsection (d) as follows:

"(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.";

by redesignating subsection (e) as subsection (d);

and by inserting at the end the following new subsection (e):

"(e) Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.".

The Commentary to §4A1.1 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. *§4A1.1(d).* Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a 'criminal justice sentence' means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice

sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).";

by redesignating Note 5 as Note 4;

in Note 4 (as so redesignated) by striking "§4A1.1(e)" each place such term appears and inserting "§4A1.1(d)";

and by inserting at the end the following new note 5:

"5. *§4A1.1(e).* One point is added if the defendant (1) receives 7 or more points under §4A1.1(a) through (d), and (2) committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a 'criminal justice sentence' means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).".

The Commentary to §4A1.1 captioned "Background" is amended in the last paragraph by striking "Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense" and inserting "Section 4A1.1(e) adds one point if the defendant receives 7 or more points under §4A1.1(a) through (d) and was under a criminal justice sentence during any part of the instant offense".

Section 4A1.2 is amended—

in subsection (a)(2) by striking "§4A1.1(e)" and inserting "§4A1.1(d)";

in subsection (m) by striking "§4A1.1(d)" and inserting "§4A1.1(e)";

in subsection (n) by striking "§4A1.1(d)" and inserting "§4A1.1(e)";

and in subsection (p) by striking "§4A1.1(e)" and inserting "§4A1.1(d)".

Part B (Zero-Point Offenders)

Subpart 1 (Adjustment for Certain Zero-Point Offenders)

Chapter Four is amended by inserting at the end the following new Part C:

" PART C — ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS

§4C1.1. *Adjustment for Certain Zero-Point Offenders*

(a) *Adjustment*.—If the defendant meets all of the following criteria:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A;

(2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);

(3) the defendant did not use violence or credible threats of violence in connection with the offense;

(4) the offense did not result in death or serious bodily injury;

(5) the instant offense of conviction is not a sex offense;

(6) the defendant did not personally cause substantial financial hardship;

(7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);

(9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and

(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

decrease the offense level determined under Chapters Two and Three by 2 levels.

(b) *Definitions and Additional Considerations*.—

(1) 'Dangerous weapon,' 'firearm,' 'offense,' and 'serious bodily injury' have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

(2) 'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition.

(3) In determining whether the defendant's acts or omissions resulted in 'substantial financial hardship' to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

Commentary

Application Notes:

1. *Application of Subsection (a)(6)*.—The application of subsection (a)(6) is to be determined independently of the application of subsection (b)(2) of §2B1.1 (Theft, Property Destruction, and Fraud).

2. *Upward Departure*.—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.".

Subpart 2 (Implementation of 28 U.S.C. § 994(j))

The Commentary to §5C1.1 captioned "Application Notes" is amended—

by inserting at the beginning of Note 1 the following new heading: "*Application of Subsection (a).*—";

by inserting at the beginning of Note 2 the following new heading: "*Application of Subsection (b).*—";

by inserting at the beginning of Note 3 the following new heading: "*Application of Subsection (c).*—";

by striking Note 4 as follows:

"If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). *See* 28 U.S.C. § 994(j). For purposes of this application note, a 'nonviolent first offender' is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase 'comparable judicial dispositions of any kind' includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.";

by redesignating Notes 5 through 10 as Notes 4 through 9, respectively;

by inserting at the beginning of Note 4 (as so redesignated) the following new heading: "*Application of Subsection (d).*—";

by inserting at the beginning of Note 5 (as so redesignated) the following new heading: "*Application of Subsection (e).*—";

by inserting at the beginning of Note 6 (as so redesignated) the following new heading: "*Departures Based on Specific Treatment Purpose*.—";

by inserting at the beginning of Note 7 (as so redesignated) the following new heading: "*Use of Substitutes for Imprisonment*.—";

by inserting at the beginning of Note 8 (as so redesignated) the following new heading: "*Residential Treatment Program*.—";

by inserting at the beginning of Note 9 (as so redesignated) the following new heading: "*Application of Subsection (f).*—";

and by inserting at the end the following new Note 10:

"10. *Zero-Point Offenders.*—

(A) *Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).

(B) *Departure for Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.*—A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).".

Subpart 3 (Additional Changes)

Chapter One, Part A is amended in Subpart 1(4)(d) (Probation and Split Sentences)—

by adding an asterisk after "community confinement or home detention.";

by adding a second asterisk after "through departures.*";

and by striking the following Note:

"*Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)",

and inserting the following Notes:

"*Note: The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (*See* USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a 'nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.' (*See* USSG App. C, amendment 801.) In 2023, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for 'zero-point' offenders who meet certain criteria. In addition, the Commission further amended the Commentary to §5C1.1 to address the alternatives to incarceration available to 'zero-point' offenders by revising the application note in §5C1.1 that addressed 'nonviolent first offenders' to focus on 'zero-point' offenders. (*See* USSG App. C, amendment 821.)

**Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)".

Section 4A1.3(b)(2)(A) is amended by striking "A departure" and inserting "Unless otherwise specified, a departure".

The Commentary to §4A1.3 captioned "Application Notes" is amended in Note 3 by striking "due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism" and inserting "unless otherwise specified".

Part C (Impact of Simple Possession of Marihuana Offenses)

The Commentary to §4A1.3 captioned "Application Notes", as amended by Part B, Subpart 3 of this amendment, is further amended in Note 3 by striking the following:

"*Downward Departures*.—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.",

and inserting the following:

"*Downward Departures*.—

(A) *Examples*.—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) *Downward Departures from Criminal History Category I*.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.".

REASON FOR AMENDMENT: This amendment is the result of several Commission studies regarding the nature of the criminal history of federal offenders, including analyses of the number and types of prior convictions included as criminal history and the ability of the criminal history rules to predict an offender's likelihood of rearrest. While these studies continue to recognize the close association between an offender's criminal history calculation under the guidelines and the likelihood of future recidivism, the amendment makes targeted changes to reduce the impact of providing additional criminal history points for offenders under a criminal justice sentence (commonly known as "status points"), to reduce recommended guideline ranges for offenders with zero criminal history points under the guidelines ("zero-point offend-

ers"), and to recognize the changing legal landscape as it pertains to simple possession of marihuana offenses. These targeted amendments balance the Commission's mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing.

Part A – Status Points

Part A of the amendment addresses "status points" for offenders, namely the additional criminal history points given to offenders for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. The amendment redesignates current subsection (d) of §4A1.1, which addresses "status points," as subsection (e) and redesignates current subsection (e), which addresses multiple crimes of violence treated as a single sentence, as subsection (d). This redesignation is made for ease of application.

Under the previous "status points" provision, two criminal history points were added under §4A1.1(d) if the defendant committed the instant offense "while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." The amendment limits the overall criminal history impact of "status points" in two ways. First, as revised, the "status points" provision under redesignated subsection (e) applies only to offenders with more serious criminal histories under the guidelines by requiring that an offender have seven or more criminal history points under subsections (a) through (d) in addition to having been under a criminal justice sentence at the time of the instant offense. Offenders with six or fewer criminal history points under subsections (a) through (d) will no longer receive "status points." Second, the amendment also reduces from two points to one point the "status points" assessed for offenders to whom the revised provision applies. Part A of the amendment also makes conforming changes to the Commentary to §4A1.1, §2P1.1 (Escape, Instigating or Assisting Escape), and §4A1.2 (Definitions and Instructions for Computing Criminal History).

As part of its study of criminal history, the Commission found that "status points" are relatively common in cases with at least one criminal history point, having been applied in 37.5 percent of cases with criminal history points over the last five fiscal years. Of the offenders who received "status points," 61.5 percent had a higher Criminal History Category as a result of the addition of the "status points." The Commission also recently published a series of research reports regarding the recidivism rates of federal offenders. *See*, *e.g.*, U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021), available at https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010. These reports again concluded that an offender's criminal history calculation under the guidelines is strongly associated with the likelihood of future recidivism by the defendant. In a related publication, the Commission also found, however, that status points add little to the overall predictive value associated with the criminal history score. *See* U.S. SENT'G COMM'N, REVISITING STATUS POINTS (2022), available at https://www.ussc.gov/research/research-reports/revisiting-status-points.

The Commission's action to limit the impact of "status points" builds upon its tradition of data-driven evolution of the guidelines. As described in the Introduction to Chapter Four, the original Commission envisioned status points as "consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior" and therefore envisioned "status points" as being reflective of, among other sentencing goals, the increased likelihood of future recidivism. *See* USSG Ch.4, Pt.A, intro. comment. The original Commission also explained, however, that it would "review additional data insofar as they become available in the future." The Commission's recent research suggests that "status points" improve the

predictive value of the criminal history score less than the original Commission may have expected, suggesting that the treatment of "status points" under Chapter Four should be refined.

Accordingly, the Commission determined that it was appropriate to address several concerns regarding the scope and impact of status points. In taking these steps, the Commission observed that the operation of the *Guidelines Manual* separately accounts for consecutive punishment imposed upon revocations of supervised release, a likely occurrence if an offender was under a criminal justice sentence during the commission of another offense. The Commission further recognized that it is also possible that an offender's criminal history score would be independently increased as the result of additional time imposed as the result of a revocation of probation or supervised release for the offense that also results in the addition of status points.

At the same time, by retaining "status points" for those offenders in higher criminal history categories, the Commission continues to recognize that "status points," like the other criminal history provisions in Chapter Four, reflect and serve multiple purposes of sentencing, including the offender's perceived lack of respect for the law, as reflected both in the offender's overall criminal history and the fact that the offender has reoffended while under a criminal justice sentence ordered by a court. *See* 18 U.S.C. § 3553(a)(2)(A)–(C).

The Commission concluded that accounting for status on a more limited basis continues to serve the broader purposes of sentencing while also addressing other concerns raised regarding the impact of status points.

Part B – Zero-Point Offenders

Part B of the amendment includes three subparts making changes pertaining to offenders who did not receive any criminal history points from Chapter Four, Part A. Subpart 1 provides for an adjustment for certain offenders with zero criminal history points. Subpart 2 revises §5C1.1 (Imposition of a Term of Imprisonment) to implement the congressional directive at 28 U.S.C. § 994(j). Finally, Subpart 3 makes other conforming changes.

Subpart 1 – Adjustment for Certain Zero-Point Offenders

Subpart 1 of Part B of the amendment creates a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders). New §4C1.1 provides a decrease of two levels from the offense level determined under Chapters Two and Three for offenders who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors. In establishing new §4C1.1, the Commission was informed by its studies of recidivism among federal offenders, as well as other extensive data analyses of offenders with no criminal history points, and public comment. The Sentencing Table in Chapter Five, Part A is divided into six criminal history categories, from I (lowest) to VI (highest). Criminal History Category I includes offenders with zero criminal history points and those with one criminal history point. Recidivism data analyzed by the Commission shows, however, that offenders with zero criminal history points have considerably lower recidivism rates than other offenders, including offenders with one criminal history point. *See* U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021), available at https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010. Among other findings, the report concluded that "zero-point offenders" were less likely to be rearrested than "one point" offenders (26.8% compared to 42.3%), the largest variation of any comparison of offenders within the same Criminal History Category.

In promulgating this change, the Commission also considered the rates of departures and variances in cases involving offenders with no criminal history points. The Commission has long

viewed the rates and extents of departures and variances from the applicable guideline ranges as a feedback mechanism from the courts that a particular area of the guidelines may warrant further review and possible amendment. In fiscal year 2021, 39.2 percent of offenders with zero criminal history points received a sentence within the guidelines range; by comparison, 47.4 percent of offenders with one criminal history point were sentenced within the guideline range. The Commission determined that the departure and variance rates for zero-point offenders, coupled with its recidivism data, warranted action.

The amendment applies to offenders with no criminal history points, including (1) offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because those convictions were not within the time limits set forth in subsection (d) and (e) of §4A1.2 (Definitions and Instructions for Computing Criminal History); and (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their "staleness" (*e.g.*, sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions, or infractions). In adopting this definition of "zero-point offenders," the Commission opted to hew to the long-standing and carefully crafted criminal history rules set forth in Chapter Four, regarding which prior convictions count for criminal history purposes and which do not. The Commission also observed that attempts to exclude offenders with certain prior convictions could lead to increased complexity and litigation and require the additional practical step of investigating prior unscorable offenses for which records may not be readily available.

While determining that a reduction is appropriate for some offenders with zero criminal history points, the Commission also identified circumstances in which zero-point offenders are appropriately excluded from eligibility in light of the seriousness of the instant offense of conviction or the existence of aggravating factors in the instant offense (*e.g.*, where the offender used violence or credible threats of violence in connection with the offense or where the instant offense of conviction was a "sex offense"). The exclusionary criteria identified by the Commission were again informed by extensive data analyses and public comment. The Commission was also informed by existing legislation, including the congressionally established criteria for the statutory safety valve at 18 U.S.C. § 3553(f) and the recent firearms legislation set forth in the Bipartisan Safer Communities Act.

Subpart 2 – Implementation of 28 U.S.C. § 994(j)

Subpart 2 of Part B of the amendment revises the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) that addresses "nonviolent first offenders." New Application Note 10(A) provides that if the defendant received an adjustment under new §4C1.1 and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. New Application Note 10(B) adds a corresponding departure provision providing that a departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the offender received an adjustment under new §4C1.1 and the applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense.

The changes to the Commentary to §5C1.1 respond to Congress's directive to the Commission at 28 U.S.C. § 994(j), directing the Commission to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. The Commission determined that the revised commentary serves Congress's intent in promulgating section 994(j) while providing appropriate limitations and guidance through reliance on the criteria set forth in new §4C1.1 and the specific statutory language set forth in section 994(j).

Subpart 3 – Additional Changes

Subpart 3 of Part B of the amendment makes a corresponding change to subsection (b)(2)(A) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited, "unless otherwise specified." The amendment also revises an explanatory note in Chapter One, Part A, Subpart 1(4)(d) (Probation and Split Sentences) to detail amendments to the *Guidelines Manual* related to the implementation of 28 U.S.C. § 994(j), first offenders, and "zero-point offenders."

Part C – Impact of Simple Possession of Marihuana Offenses

Part C of the amendment revises the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marihuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted. Specifically, Part C provides that a downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person. Most commenters, including the Department of Justice, supported this change. *See* Letter from Jonathan J. Wroblewski, Dir., Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Feb. 27, 2023), *in* U.S. SENT'G COMM'N, 2022–2023 AMENDMENT CYCLE PROPOSED AMENDMENTS/PUBLIC COMMENT (2023); *see also* U.S. SENT'G COMM'N, 2022–2023 AMENDMENT CYCLE PROPOSED AMENDMENTS/PUBLIC COMMENT (2023) (providing numerous public comment supporting the amendment).

The Commission also relied upon its recently published report on the impact of simple possession of marihuana offenses on sentencing. *See* U.S. SENT'G COMM'N, WEIGHING THE IMPACT OF SIMPLE POSSESSION OF MARIJUANA: TRENDS AND SENTENCING IN THE FEDERAL SYSTEM (2023), available at https://www.ussc.gov/research/research-reports/weighing-impact-simple-possession-marijuana. In that study, the Commission found that 4,405 federal offenders (8.0%) received criminal history points under the federal sentencing guidelines for prior marihuana possession sentences in fiscal year 2021. Most such prior sentences were for state court convictions resulting in less than 60 days in prison or non-custodial sentences. The Commission also found informative that ten percent (10.2%) of these 4,405 offenders had no other criminal history points, and that for 40 percent (40.1%) of the 4,405 offenders (1,765), the criminal history points for prior marihuana possession sentences resulted in a higher Criminal History Category.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 822

AMENDMENT: The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 2, in the paragraph that begins "'Crime of violence' means", by inserting after "territorial jurisdiction of the United States." the following: "'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.".

Section 4B1.2(a) is amended—

by inserting at the beginning the following new heading "*Crime of Violence*.—";

and in paragraph (1) by striking "another," and inserting "another;".

Section 4B1.2(b) is amended by striking the following:

"The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.",

and inserting the following:

"*Controlled Substance Offense*.—The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).".

Section 4B1.2(c) is amended by inserting at the beginning the following new heading "*Two Prior Felony Convictions*.—".

Section 4B1.2 is amended by inserting at the end the following two new subsections (d) and (e):

"(d) *Inchoate Offenses Included.*—The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) *Additional Definitions*.—

(1) *Forcible Sex Offense*.—'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) *Extortion*.—'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) *Robbery*.—'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future,

to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.

(4) *Prior Felony Conviction*.—'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1—

in the heading by striking "*Definitions*.—" and inserting "*Further Considerations Regarding 'Crime of Violence' and 'Controlled Substance Offense'*.—";

by striking the first three paragraphs as follows:

"'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.";

and by striking the last paragraph as follows:

"'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

REASON FOR AMENDMENT: This amendment is a result of the Commission's work on §4B1.2 (Definitions of Terms Used in Section 4B1.1) regarding several application issues that have arisen in the context of the career offender guideline. As part of this study, the Commission considered varying case law interpreting certain guideline definitions and commentary to the guideline. Informed by the case law, public comment and relevant sentencing data, this amendment specifically addresses application issues regarding the meaning of "robbery" and

"extortion" and the treatment of inchoate offenses. The amendment also makes necessary changes to further implement the congressional directive at 28 U.S.C. § 994(h).

The amendment makes several changes to address a circuit conflict regarding the authoritative weight afforded to certain commentary to §4B1.2. The commentary to §4B1.2 prior to the amendment provided that the definitions of "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. Although most circuits had previously held that this commentary was authoritative under *Stinson v. United States*, 508 U.S. 36 (1993), several courts have now concluded that the guideline definition of "controlled substance offense" does not include inchoate offenses because such offenses are not expressly included in the guideline text. *See United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (*en banc*); *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (*en banc*); *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (*en banc*); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018). Several courts held that the Commission exceeded its authority under *Stinson* when it attempted to incorporate inchoate offenses into §4B1.2(b)'s definition through the commentary, finding that the commentary can only interpret or explain the guideline, it cannot expand its scope by adding qualifying offenses. *See, e.g.*, *Havis*, 927 F.3d at 385–87. More recently, courts have relied on *Kisor v. Wilkie*, 139 S. Ct. 2400 (2022), to hold that guideline commentary should not be afforded deference unless the guideline text is genuinely ambiguous. *See, e.g.*, *Dupree*, 57 F.4th at 1275. Applying the *Kisor* holding to the guidelines, courts have concluded that the plain language definition of "controlled substance offense" in §4B1.2 unambiguously excludes inchoate offenses. Similarly, courts have held that "crime of violence" excludes conspiracies because the §4B1.2 commentary does not warrant *Kisor* deference. *See, e.g.*, *United States v. Abreu*, 32 F.4th 271, 277–78 (3d Cir. 2022).

The amendment addresses this circuit conflict by moving, without change, the commentary including certain inchoate and accessory offenses in the definitions of "crime of violence" and "controlled substance offense" to the text of the guideline. While not the subject of the circuit conflict, the amendment also moves the definitions of enumerated offenses (*i.e.*, "forcible sex offense" and "extortion") and "prior felony conviction" from the commentary to a new subsection (e) in the guideline to avoid similar challenges to their applicability.

The amendment next addresses a concern that Hobbs Act robbery offenses no longer qualify as "crimes of violence" under §4B1.2. In 2016, the Commission amended §4B1.2 to, among other things, delete the "residual clause" and revise the "enumerated clause" by moving enumerated offenses that were previously listed in the commentary to the guideline itself. Although the guideline generally relies on existing case law for purposes of defining most enumerated offenses, the amendment added to the Commentary to §4B1.2 definitions for two of the enumerated offenses: "forcible sex offense" and "extortion." Consistent with the Commission's goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrowed the generic definition of extortion by limiting it to offenses having an element of force or an element of fear or threat "of physical injury," as opposed to non-violent threats such as injury to reputation. As such, extortion is defined as "obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury."

After the 2016 amendment, every Court of Appeals addressing the issue under the guidelines has held that Hobbs Act robbery is not a "crime of violence" under §4B1.2, reasoning that neither generic robbery nor the guidelines definition of extortion encompass threats against property while the Hobbs Act defines "robbery" as, among other things, "the unlawful taking or obtaining of personal property . . . by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or *property* . . . . " *See* 18 U.S.C. § 1951(b)(1) (emphasis added); *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*,

14 F.4th 190 (3d Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017).

The amendment amends §4B1.2 to add to the new subsection (e) a definition of "robbery" that mirrors the "robbery" definition at 18 U.S.C. § 1951(b)(1) and makes a conforming change to §2L1.2 (Illegal Reentry), which also includes robbery as an enumerated offense. The Commission views the recent decisions holding that Hobbs Act robbery is not a crime of violence under the guidelines as an unintended consequence of the 2016 amendment to the career offender guideline meant to remove threats to reputation. In addition, the Commission conducted an analysis of recent cases and found that the Hobbs Act robberies overwhelmingly involved violence.

The amendment clarifies that "actual or threatened force" for purposes of the new "robbery" definition is "force sufficient to overcome a victim's resistance." The Commission concludes that such definition, relying on the Supreme Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019), would eliminate potential litigation over the meaning of actual or threatened force in this context and is consistent with the level of force necessary for a robbery under the force clause.

Finally, the amendment revises the definition of "controlled substance offense" in §4B1.2(b) to include "an offense described in 46 U.S.C. § 70503(a) or § 70506(b)." The directive at 28 U.S.C. § 994(h) instructs the Commission to assure that "the guidelines specify a term of imprisonment at or near the maximum term authorized" for offenders who are 18 years or older and have been convicted of a felony that is, and have previously been convicted of two or more felonies that are, among other things, "an offense described in . . . chapter 705 of title 46." *See* 28 U.S.C. § 994(h). In 2016, Congress enacted the Coast Guard Authorization Act of 2015, Pub. L. 114–120 (2016), which amended Chapter 705 of Title 46 by adding two new offenses to section 70503(a), in subparagraphs (2) and (3). Following this statutory change, these two new offenses are not covered by the pre-amendment definition of "controlled substance offense" in §4B1.2 as required by the directive.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 823

AMENDMENT: Section 3D1.2(d) is amended by striking "§§2G1.1, 2G2.1;" and inserting "§§2G1.1, 2G1.3, 2G2.1;".

The Commentary to §5F1.7 captioned "Background" is amended—

by striking "six months" and inserting "6 months";

by striking "as the Bureau deems appropriate. 18 U.S.C. § 4046.' " and inserting "as the Bureau deems appropriate.' 18 U.S.C. § 4046.";

and by striking the final paragraph as follows:

" The Bureau of Prisons has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau of Prisons has titled 'intensive confinement program'). Under

these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the 'intensive confinement' portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases.",

and inserting the following:

" In 1990, the Bureau of Prisons issued an operations memorandum (174-90 (5390), November 20, 1990) that outlined eligibility criteria and procedures for the implementation of a shock incarceration program (which the Bureau of Prisons titled the 'intensive confinement program'). In 2008, however, the Bureau of Prisons terminated the program and removed the rules governing its operation. *See* 73 FR 39863 (July 11, 2008).".

REASON FOR AMENDMENT: This two-part amendment responds to miscellaneous guideline application issues.

First, the amendment revises subsection (d) of §3D1.2 (Grouping of Closely Related Counts) to provide that multiple counts involving more than one victim sentenced under §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) are explicitly excluded from grouping under §3D1.2(d). Subsection 3D1.2(d) provides that certain guidelines are excluded from the operation of the grouping rules in Chapter Three, Part D (Multiple Counts). Among the guidelines specifically excluded under §3D1.2(d) is §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor). When §2G1.3 was promulgated in 2004, some offenses that were originally referenced to §2G1.1 were moved to the new §2G1.3, but §2G1.3 was not added to the list of excluded guidelines at §3D1.2(d). *See* USSG App. C, amend. 664 (effective date: Nov. 1, 2004). The amendment corrects that oversight and treats §2G1.3 similarly to §2G1.1.

Second, the amendment updates the Commentary to §5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons (BOP) no longer operates a shock incarceration program. The Commentary to §5F1.7 describes the authority of the BOP to operate a shock incarceration program and the procedures that the BOP established in 1990 regarding operation of such a program. However, the BOP terminated its shock incarceration program and removed the rules governing its operation in 2008. The amendment updates the Commentary to §5F1.7 to reflect that shock incarceration is no longer a potential sentencing option, foreclosing any potential confusion on its current availability.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 824

AMENDMENT: The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(E) by striking "(*e.g.* a defendant" and inserting "(*e.g.*, a defendant".

The Commentary to §1B1.3 captioned "Background" is amended by striking "the guidelines in those Chapters" and inserting "the guidelines in those chapters".

The Commentary to §1B1.4 captioned "Background" is amended by striking "in imposing sentence within that range" and inserting "in imposing a sentence within that range".

The Commentary to §1B1.10 captioned "Background" is amended by striking "Title 18" and inserting "title 18".

The Commentary to §1B1.11 captioned "Background" is amended by striking "133 S. Ct. 2072, 2078" and inserting "569 U.S. 530, 533".

The Commentary to §2A4.2 captioned "Statutory Provisions" is amended by striking "§§ 876," and inserting "§§ 876(a),".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by striking "876," and inserting "876(c),".

The Commentary to §2B3.2 captioned "Statutory Provisions" is amended by striking "§§ 875(b), 876," and inserting "§§ 875(b), (d), 876(b), (d),".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

in Note 8(A) by striking "the statute (21 U.S.C. § 841(b)(1)), as the primary basis" and inserting "the statute (21 U.S.C. § 841(b)(1)) as the primary basis", and by striking "fentanyl, LSD and marihuana" and inserting "fentanyl, LSD, and marihuana";

in Note 8(D)—

under the heading relating to Schedule I or II Opiates, by striking the following:

"1 gm of Heroin =	1 kg
1 gm of Dextromoramide =	670 gm
1 gm of Dipipanone =	250 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm
1 gm of Alphaprodine =	100 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Morphine =	500 gm
1 gm of Oxycodone (actual) =	6700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm
1 gm of Codeine =	80 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Hydrocodone (actual) =	6700 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Opium =	50 gm
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg",

and inserting the following:

"1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP) =	700 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine (MPPP) =	700 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Alphaprodine =	100 gm
1 gm of Codeine =	80 gm
1 gm of Dextromoramide =	670 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Dipipanone =	250 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Heroin =	1 kg
1 gm of Hydrocodone (actual) =	6,700 gm
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Morphine =	500 gm
1 gm of Opium =	50 gm
1 gm of Oxycodone (actual) =	6,700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm";

under the heading relating to Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the following:

"1 gm of Cocaine =	200 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of Fenethylline =	40 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (Actual) =	20 kg
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (Actual) =	20 kg
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of 4-Methylaminorex ('Euphoria') =	100 gm
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of Phenmetrazine =	80 gm
1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm Phenylacetone/P_2P (in any other case) =	75 gm
1 gm Cocaine Base ('Crack') =	3,571 gm
1 gm of Aminorex =	100 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of N-Benzylpiperazine =	100 gm",

and inserting the following:

"1 gm of 4-Methylaminorex ('Euphoria') =	100 gm
1 gm of Aminorex =	100 gm

1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ('Crack') =	3,571 gm
1 gm of Fenethylline =	40 gm
1 gm of 'Ice' =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P_2P) (in any other case) =	75 gm";

under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking "a synthetic cathinone" and inserting "a Synthetic Cathinone";

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

"1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg
1 gm of Diethyltryptamine/DET =	80 gm
1 gm of Dimethyltryptamine/DM =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm
1 gm of Peyote (Dry) =	0.5 gm
1 gm of Peyote (Wet) =	0.05 gm
1 gm of Phencyclidine/PCP =	1 kg
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm
1 gm of Paramethoxymethamphetamine/PMA =	500 gm
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg",

and inserting the following:

"1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg

1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm
1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg”;

under the heading relating to Schedule I Marihuana, by striking the following:

“1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm
1 gm of Hashish Oil =	50 gm
1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Tetrahydrocannabinol, Organic =	167 gm
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm”,

and inserting the following:

“1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Hashish Oil =	50 gm
1 gm of Marihuana/Cannabis (granulated, powdered, etc.) =	1 gm
1 gm of Tetrahydrocannabinol (organic) =	167 gm
1 gm of Tetrahydrocannabinol (synthetic) =	167 gm”;

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking “a synthetic cannabinoid” and inserting “a Synthetic Cannabinoid”, and by striking “‘Synthetic cannabinoid,’ for purposes of this guideline” and inserting “‘Synthetic Cannabinoid,’ for purposes of this guideline”;

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking “except gamma-hydroxybutyric acid” both places such term appears and inserting “except Gamma-hydroxybutyric Acid”;

under the heading relating to Gamma-hydroxybutyric Acid, by striking “of gamma-hydroxybutyric acid” and inserting “of Gamma-hydroxybutyric Acid”;

under the heading relating to Schedule III Substances (except ketamine), by striking “except ketamine” in the heading and inserting “except Ketamine”;

under the heading relating to Ketamine, by striking "of ketamine" and inserting "of Ketamine";

under the heading relating to Schedule IV (except flunitrazepam), by striking "except flunitrazepam" in the heading and inserting "except Flunitrazepam";

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking "of amphetamine or methamphetamine" in the heading and inserting "of Amphetamine or Methamphetamine";

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking "except flunitrazepam, GHB, or ketamine" in the heading and inserting "except Flunitrazepam, GHB, or Ketamine", by striking "of 1,4-butanediol" and inserting "of 1,4-Butanediol", and by striking "of gamma butyrolactone" and inserting "of Gamma Butyrolactone";

in Note 9 in the Typical Weight Per Unit (Dose, Pill, or Capsule) Table, under the heading relating to Hallucinogens, by striking the following:

"MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg",

and inserting the following:

"2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg";

and in Note 21, by striking "Section §5C1.2(b)" and inserting "Section 5C1.2(b)".

The Commentary to §2D1.1 captioned "Background" is amended by striking "Public Law 103–237" and inserting "Public Law 104–237", and by inserting after "to change the title of the Drug Equivalency Tables to the 'Drug Conversion Tables.'" the following: "*See* USSG App. C, Amendment 808 (effective November 1, 2018).".

The Commentary to §2D2.3 captioned "Background" is amended by striking "Section 6482" and inserting "section 6482".

Section 2G2.1(b)(6)(A) is amended by striking "engage sexually explicit conduct" and inserting "engage in sexually explicit conduct".

The Commentary to §2H3.1 captioned "Application Notes" is amended in Note 5(B) by striking "(*e.g.* physical harm" and inserting "(*e.g.*, physical harm".

The Commentary to §2K2.4 captioned "Statutory Provisions" is amended by striking "§§ 844(h)" and inserting "§§ 844(h), (o)".

The Commentary to §2M1.1 captioned "Background" is amended by striking "this Part" and inserting "this part".

The Commentary to §2M4.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. App. § 462" and inserting "50 U.S.C. § 3811".

The Commentary to §2M5.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. App. §§ 2401–2420" and inserting "50 U.S.C. §§ 4601–4623. For additional statutory provision(s), *see* Appendix A (Statutory Index)".

The Commentary to §2M5.1 captioned "Application Notes" is amended—

in Note 3 by striking "50 U.S.C. App. § 2410" and inserting "50 U.S.C. § 4610";

and in Note 4 by striking "50 U.S.C. App. 2405" and inserting "50 U.S.C. § 4605".

The Commentary to §2M5.3 captioned "Application Notes" is amended in Note 1, in the paragraph that begins "'Specially designated global terrorist' has", by striking "§ 594.513" and inserting "§ 594.310".

The Commentary to §2M6.1 captioned "Application Notes" is amended in Note 1—

by striking the following paragraph:

"'Restricted person' has the meaning given that term in 18 U.S.C. § 175b(d)(2).",

and by striking the following paragraph:

"'Vector' has the meaning given that term in 18 U.S.C. § 178(4).".

The Commentary to §2T1.1 captioned "Application Notes" is amended—

in Note 6, in the paragraph that begins "'Gross income' has", by striking "§1.61" and inserting "§ 1.61-1";

and in Note 7 by striking "Subchapter C corporation" and inserting "subchapter C corporation".

The Commentary to §2T1.1 captioned "Background" is amended by striking "the treasury" and inserting "the Treasury".

Chapter Two, Part T, Subpart 2 is amended in the introductory commentary by striking "Parts I–IV of Subchapter J of Chapter 51 of Subtitle E of Title 26" and inserting "parts I–IV of subchapter J of chapter 51 of subtitle E of title 26, United States Code".

Chapter Two, Part T, Subpart 3 is amended in the introductory commentary by striking "Subpart" both places such term appears and inserting "subpart".

Chapter Three, Part A is amended in the introductory commentary by striking "Part" and inserting "part".

The Commentary to §3A1.1 captioned "Background" is amended by striking "Section 280003" and inserting "section 280003".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 3 by striking "the victim was a government officer or employee, or a member of the immediate family thereof" and inserting "the victim was a government officer or employee, a former government officer or employee, or a member of the immediate family thereof".

Chapter Three, Part B is amended in the introductory commentary by striking "Part" and inserting "part".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4(I) by striking "Title 18" and inserting "title 18".

Chapter Three, Part D is amended in the introductory commentary by striking "Part" each place such term appears and inserting "part".

The Commentary to §3D1.1 captioned "Application Notes" is amended in Note 2 by striking "Part" both places such term appears and inserting "part".

The Commentary to §3D1.1 captioned "Background" is amended by striking "Chapter 3" and inserting "Chapter Three", and by striking "Chapter 4" and inserting "Chapter Four".

The Commentary to §3D1.2 captioned "Background" is amended by striking "Part" both places such term appears and inserting "part".

The Commentary to §3D1.3 captioned "Background" is amended by striking "Part" and inserting "part".

The Commentary to §3D1.4 captioned "Background" is amended by striking "Part" and inserting "part".

The Commentary to §4A1.3 captioned "Application Notes" is amended in Note 2(C)(v) by striking "this Chapter" and inserting "this chapter".

The Commentary to §4B1.1 captioned "Background" is amended by striking "Title 28" and inserting "title 28".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 1 by striking "this Chapter" and inserting "this chapter".

The Commentary to §5E1.1 captioned "Application Notes" is amended in Note 1 by striking "Chapter" both places such term appears and inserting "chapter"; by striking "Title 18" both places such term appears and inserting "title 18"; and by striking "Subchapter C" and inserting "subchapter C".

The Commentary to §5E1.1 captioned "Background" is amended by striking "Title 18" and inserting "title 18".

The Commentary to §5E1.3 captioned "Background" is amended by striking "Title 18" and inserting "title 18", and by striking "The Victims" and inserting "the Victims".

The Commentary to §5E1.4 captioned "Background" is amended by striking "Titles" and inserting "titles".

The Commentary to §5G1.3 captioned "Background" is amended by striking "132 S. Ct. 1463, 1468" and inserting "566 U.S. 231, 236", and by striking "132 S. Ct. at 1468" and inserting "566 U.S. at 236".

Chapter Five, Part H is amended in the introductory commentary by striking "Part" each place such term appears and inserting "part".

Chapter Six, Part A is amended in the introductory commentary by striking "Part" and inserting "part".

Chapter Seven, Part A, Subpart 3(b) (Choice between Theories) is amended by striking "Title 21" and inserting "title 21".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(G) by striking "'Prior criminal adjudication' means" and inserting "'Criminal Adjudication' means".

The Commentary to §8B1.1 captioned "Background" is amended by striking "Title 18" and inserting "title 18".

The Commentary to §8B2.1 captioned "Application Notes" is amended in Note 1, in the paragraph that begins "'Governing authority' means", by striking "means the (A) the Board" and inserting "means (A) the Board".

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 1 by striking "'prior criminal adjudication'" and inserting "'criminal adjudication'".

The Commentary to §8C3.2 captioned "Application Note" is amended in Note 1 by striking "the period provided for payment shall in no event exceed five years" and inserting "the period provided for payment shall be the shortest time in which full payment can reasonably be made".

Section 8C3.3(a) is amended by striking "its ability" and inserting "the ability of the organization".

The Commentary to §8E1.1 captioned "Background" is amended by striking "Title 18" and inserting "title 18".

Appendix A (Statutory Index) is amended—

by striking the following line reference:

"18 U.S.C. § 876 2A4.2, 2A6.1, 2B3.2, 2B3.3";

by inserting before the line referenced to 18 U.S.C. § 877 the following new line references:

"18 U.S.C. § 876(a) 2A4.2, 2B3.2

18 U.S.C. § 876(b) 2B3.2

18 U.S.C. § 876(c) 2A6.1

18 U.S.C. § 876(d) 2B3.2, 2B3.3";

in the line referenced to 25 U.S.C. § 450d by striking "§ 450d" and inserting "§ 5306";

by striking the following line references:

"33 U.S.C. § 1227(b) 2J1.1, 2J1.5

33 U.S.C. § 1232(b)(2) 2A2.4";

by inserting before the line referenced to 46 U.S.C. App. § 1707a(f)(2) the following new line references:

"46 U.S.C. § 70035(b) 2J1.1, 2J1.5

46 U.S.C. § 70036(b) 2A2.4";

by striking the following line references:

"50 U.S.C. App. § 462 2M4.1

50 U.S.C. App. § 527(e) 2X5.2

50 U.S.C. App. § 2410 2M5.1";

and by inserting before the line referenced to 52 U.S.C. § 10307(c) the following new line references:

"50 U.S.C. § 3811 2M4.1

50 U.S.C. § 3937(e) 2X5.2

50 U.S.C. § 4610 2M5.1".

REASON FOR AMENDMENT: This amendment makes technical, stylistic, and other non-substantive changes to the *Guidelines Manual*.

First, the amendment makes clerical changes to correct typographical errors in the following guidelines and commentary: §1B1.1 (Application Instructions); §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)); §1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)); §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)); §2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs); §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production); §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); §2M1.1 (Treason); §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents); the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes); the Introductory

Commentary to Chapter Two, Part T, Subpart 3 (Customs Taxes); the Introductory Commentary to Chapter Three, Part A (Victim-Related Adjustments); §3A1.1 (Hate Crime Motivation or Vulnerable Victim); the Introductory Commentary to Chapter Three, Part B (Role in the Offense); §3C1.1 (Obstructing or Impeding the Administration of Justice); the Introductory Commentary to Chapter Three, Part D (Multiple Counts); §3D1.1 (Procedure for Determining Offense Level on Multiple Counts); §3D1.2 (Groups of Closely Related Counts); §3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts); §3D1.4 (Determining the Combined Offense Level); §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); §4B1.1 (Career Offender); §5C1.1 (Imposition of a Term of Imprisonment); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); the Introductory Commentary to Chapter Five, Part H (Specific Offender Characteristics); the Introductory Commentary to Chapter Six, Part A (Sentencing Procedures); Chapter Seven, Part A (Introduction to Chapter Seven); §8B1.1 (Restitution — Organizations); §8B2.1 (Effective Compliance and Ethics Program); §8C3.3 (Reduction of Fine Based on Inability to Pay); and §8E1.1 (Special Assessments — Organizations).

Second, the amendment makes clerical changes to the Commentary to §§1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) and 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update citations of Supreme Court cases. In addition, the amendment makes technical changes to (1) the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to add a missing reference to 18 U.S.C. § 844(o); (2) the Commentary to §2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons Of Mass Destruction; Attempt or Conspiracy), to delete the definitions of two terms that are not currently used in the guideline; (3) the Commentary to §§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose) and 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), to correct references to the Code of Federal Regulations; and (4) the Commentary to §3A1.2 (Official Victim), to add missing content in Application Note 3.

Third, the amendment makes technical changes to the Commentary to §§2A4.2 (Demanding or Receiving Ransom Money), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A (Statutory Index), to provide references to the specific applicable provisions of 18 U.S.C. § 876 (Mailing threatening communications).

Fourth, the amendment makes certain stylistic and technical changes to the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking). It revises the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9 to reorganize the controlled substances contained therein in alphabetical order to make the tables more user-friendly. The amendment also makes minor changes to the controlled substance references to promote consistency in the use of capitalization, commas, parentheticals, and slash symbols throughout the Drug Conversion Tables. In addition, the amendment makes clerical changes throughout the Commentary to correct certain typographical errors. It also amends the Background Commentary to add a specific reference to Amendment 808, which replaced the term "marihuana equivalency" with the new term "converted drug weight" and changed the title of the "Drug Equivalency Tables" to "Drug Conversion Tables."

Fifth, the amendment makes clerical changes to reflect the editorial reclassification of certain sections of the United States Code. Effective December 1, 2015, the Office of Law Revision

Counsel eliminated the Appendix to title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of title 50 and to other titles of the United States Code. To reflect the new section numbers of the reclassified provisions, the amendment makes changes to §2M4.1 (Failure to Register and Evasion of Military Service), §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), and Appendix A. Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from chapter 14 of title 25 of the United States Code to four new chapters in title 25 to improve the organization of the title. To reflect these changes, the amendment makes further changes to Appendix A.

Sixth, the amendment makes technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations). It replaces the term "prior criminal adjudication," as found and defined in Application Note 3(G) of §8A1.2 (Application Instructions — Organizations), with "criminal adjudication" to better reflect how that term is used throughout Chapter Eight. The amendment also makes conforming changes to the Commentary to §8C2.5 (Culpability Score) to account for the new term. In addition, the amendment revises Application Note 1 of §8C3.2 (Payment of the Fine — Organizations) to reflect the current language of subsection (d) of 18 U.S.C. § 3572 (Imposition of a sentence of fine and related matters), providing that if the court permits other than immediate payment of a fine or other monetary payment, the period provided for payment shall be the shortest time in which full payment can reasonably be made.

Finally, the amendment makes clerical changes to provide updated references to certain sections of the United States Code that were redesignated by legislation. The Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. 115–282 (2018) (hereinafter "the Act"), among other things, established a new chapter 700 (Ports and Waterway Safety) in subtitle VII (Security and Drug Enforcement) of title 46 (Shipping) of the United States Code. Section 401 of the Act repealed the Ports and Waterways Safety Act of 1972, previously codified in 33 U.S.C. §§ 1221–1232b, and restated its provisions with some revisions in the new chapter 700 of title 46, specifically at 46 U.S.C. §§ 70001–70036. Appendix A includes references to Chapter Two guidelines for both former 33 U.S.C. §§ 1227(b) and 1232(b). The amendment revises Appendix A to delete the references to 33 U.S.C. §§ 1227(b) and 1232(b) and replace them with updated references to 46 U.S.C. §§ 70035(b) and 70036(b). The Act did not make substantive revisions to either of these provisions.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 825

AMENDMENT: Section 1B1.10 is amended—

in subsection (d) by striking "and 782 (subject to subsection (e)(1))" and inserting "782 (subject to subsection (e)(1)), and 821 (parts A and B, subpart 1 only and subject to subsection (e)(2))";

and in subsection (e)—

in the heading, by striking "*Instruction*" and inserting "*Instructions*";

and by adding at the end the following new paragraph (2):

"(2) The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court's order is February 1, 2024, or later.".

The Commentary to §1B1.10 captioned "Application Notes" is amended—

by redesignating Notes 7 and 8 as Notes 8 and 9, respectively;

and by inserting after Note 6 the following new Note 7:

"7. *Application to Amendment 821 (Parts A and B, Subpart 1 Only).*—As specified in subsection (d), the parts of Amendment 821 that are covered by this policy statement are Parts A and B, Subpart 1 only, subject to the special instruction at subsection (e)(2). Part A amended §4A1.1 (Criminal History Category) to limit the overall criminal history impact of "status points" (*i.e.*, the additional criminal history points given to defendants for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status). Part B, Subpart 1 created a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) to provide a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors.

The special instruction at subsection (e)(2) delays the effective date of orders reducing a defendant's term of imprisonment to a date no earlier than February 1, 2024. A reduction based on the retroactive application of Part A or Part B, Subpart 1 of Amendment 821 that does not comply with the requirement that the order take effect no earlier than February 1, 2024, is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2). Subsection (e)(2), however, does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before February 1, 2024, provided that any order reducing the defendant's term of imprisonment has an effective date of February 1, 2024, or later.".

REASON FOR AMENDMENT: The Commission has determined that the targeted changes to the criminal history rules made in Parts A and B, Subpart 1 of Amendment 821 should be applied retroactively. Accordingly, this amendment expands the listing in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application.

Part A of Amendment 821 limits the overall criminal history impact of "status points" (*i.e.*, the additional criminal history points given to defendants for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status) under §4A1.1 (Criminal History Category). Part B, Subpart 1 of Amendment 821 creates a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) providing a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors.

In making this determination, the Commission considered the following factors, among others: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively.

See §1B1.10, comment. (backg'd.). Applying those standards to Amendment 821, the Commission determined that, among other factors:

(1) The purpose of these targeted amendments is to balance the Commission's mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing and to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process." *See* 28 U.S.C. § 991(b). The Commission determined that the policy reasons underlying the prospective application of the amendment apply with equal force to individuals who are already sentenced.

In relation to Part A, the Commission determined that accounting for status on a more limited basis continues to serve the broader purposes of sentencing while also addressing other concerns raised regarding the impact of status points. The Commission also determined that the changes made by Part A reflect updated research suggesting that status points' ability to predict future recidivism—a core justification for their use—may be less than the original Commission may have expected.

In implementing Part B, Subpart 1, the Commission sought, in part, to fulfill one of its core congressional directives to ensure that "the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C. § 994(j). The Commission further determined that the changes made by Part B, Subpart 1 reflect its statutory mission to provide for penalties that are "sufficient, but not greater than necessary" by recognizing that individuals with zero criminal history points have considerably lower recidivism rates than other sentenced individuals, as well as the fact that courts generally depart and vary more often in cases involving individuals with zero criminal history points as compared with other individuals.

(2) The Commission determined that the changes in Parts A and B, Subpart 1 of Amendment 821 would meaningfully impact the sentence of many currently incarcerated individuals. The Commission estimates that 11,495 currently incarcerated individuals would have a lower guideline range as the result of retroactive application of Part A of Amendment 821, with an average sentence reduction of 14 months (or 11.7%). The Commission further estimates that 7,272 currently incarcerated individuals would have a lower guideline range as the result of retroactive application of Part B, Subpart 1 of Amendment 821, with an average sentence reduction of 15 months (or 17.6%).

(3) The Commission determined that applying Part A of Amendment 821 retroactively, requiring the recalculation of criminal history points and making the determination as to whether the individual would fall within a lower criminal history category, presents minimal difficulty. While recognizing that consideration of the exclusionary criteria in Part B, Subpart 1 of Amendment 821 could result in an increased administrative burden, the Commission concluded that any such burden is manageable.

The Commission concludes that consideration of these factors supports a policy determination that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. In making this determination, the Commission remains cognizant of the fact that public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the term of imprisonment is warranted, to consider the nature and seriousness of the danger to any

person or the community that may be posed by such a reduction. *See* §1B1.10, comment. (n.1(B)(ii)).

At the same time, the Commission also determined that the agencies of the federal criminal justice system responsible for reentry into society need time to prepare, and to help the released individuals prepare, for that reentry. The Commission concluded that a three-month delay in the effective date of any orders granting sentence reductions under Amendment 821 is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all individuals who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit those agencies that will be responsible for individuals after their release to prepare for the increased responsibility.

Therefore, the Commission added a Special Instruction at subsection (e) providing that a reduced term of imprisonment based on retroactive application of Amendment 821 shall not be ordered unless the effective date of the court's order is February 1, 2024, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before February 1, 2024, as long as any order reducing the term of imprisonment has an effective date of February 1, 2024, or later.

Effective Date: The effective date of this amendment is November 1, 2023.

AMENDMENT 826

AMENDMENT: Section 1B1.3 is amended—

in subsection (a), in the heading, by striking "*Chapters Two (Offense Conduct) and Three (Adjustments).*" and inserting "*Chapters Two (Offense Conduct) and Three (Adjustments).*—";

in subsection (b), in the heading, by striking "*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*" and inserting "*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*—";

and by inserting at the end the following new subsection (c):

"(c) *Acquitted Conduct*.—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.".

The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting at the end the following new Note 10:

"10. *Acquitted Conduct.*—Subsection (c) provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct establishes, in whole or in part, the instant offense of conviction. There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.".

The Commentary to §6A1.3 is amended—

by striking "*see also United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution);" and inserting "*Witte v. United States*, 515 U.S. 389, 397–401 (1995) (noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute);";

by striking "*Watts*, 519 U.S. at 157" and inserting "*Witte*, 515 U.S. at 399–401";

and by inserting at the end of the paragraph that begins "The Commission believes that use of a preponderance of the evidence standard" the following: "Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* §1B1.3(c) (Relevant Conduct). Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661.".

Reason for Amendment: This amendment revises §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to exclude acquitted conduct from the scope of relevant conduct used in calculating a sentence range under the federal guidelines. Acquitted conduct is unique, and this amendment does not comment on the use of uncharged, dismissed, or other relevant conduct as defined in §1B1.3 for purposes of calculating the guideline range.

The use of acquitted conduct to increase a defendant's sentence has been a persistent concern for many within the criminal justice system and the subject of robust debate over the past several years. A number of jurists, including current and past Supreme Court Justices, have urged reconsideration of acquitted-conduct sentencing. *See, e.g.*, *McClinton v. United States*, 143 S. Ct. 2400, 2401 & n.2 (2023) (Sotomayor, J., Statement respecting the denial of certiorari) (collecting cases and statements opposing acquitted-conduct sentencing). In denying certiorari last year in *McClinton*, multiple Justices suggested that it would be appropriate for the Commission to resolve the question of how acquitted conduct is considered under the guidelines. *See id*. at 2402–03; *id.* at 2403 (Kavanaugh, J., joined by Gorsuch, J. and Barrett, J., Statement respecting the denial of certiorari), *but see id*. (Alito, J., concurring in the denial of certiorari). Many states have prohibited consideration of acquitted conduct. *See id.* at 2401 n.2 (collecting cases). And, currently, Congress is considering bills to prohibit its consideration at sentencing, with bipartisan support. *See* Prohibiting Punishment of Acquitted Conduct Act of 2023, S. 2788, 118th Cong. (1st Sess. 2023); Prohibiting Punishment of Acquitted Conduct Act of 2023, H.R. 5430, 118th Cong. (1st Sess. 2023).

First, the amendment revises §1B1.3 by adding new subsection (c), which provides that "[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court unless such conduct also establishes, in whole or in part, the instant offense of conviction." This rule seeks to promote respect for the law, which is a statutory obligation of the Commission. *See* 28 U.S.C § 994(a)(2); *id.* § 991(b)(1)(A) & (B); 18 U.S.C. § 3553(a)(2).

This amendment seeks to promote respect for the law by addressing some of the concerns that numerous commenters have raised about acquitted-conduct sentencing, including those involving the "perceived fairness" of the criminal justice system. *McClinton*, 143 S. Ct. at 2401

(Sotomayor, J., Statement respecting the denial of certiorari). Some commenters were concerned that consideration of acquitted conduct to increase the guideline range undermines the historical role of the jury and diminishes "the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system." *McClinton*, 143 S. Ct. at 2402–03 (Sotomayor, J., Statement respecting the denial of certiorari); *see United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (expressing concern that "using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system"). They argue that consideration of acquitted conduct at sentencing contributes to the erosion of the jury-trial right and enlarges the already formidable power of the government, reasoning that defendants who choose to put the government to its proof "face all the risks of conviction, with no practical upside to acquittal unless they . . . are absolved of *all* charges." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of reh'g en banc). For these reasons, "acquittals have long been 'accorded special weight,' distinguishing them from conduct that was never charged and passed upon by a jury," *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., Statement respecting the denial of certiorari (quoting *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980))) and viewed as "inviolate," *McElrath v. Georgia*, 601 U.S. 87, 94 (2024).

Second, the amendment adds new Application Note 10 to §1B1.3(c), which instructs that in "cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction . . . , the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct." The amendment thus clarifies that while "acquitted conduct" cannot be considered in determining the guideline range, any conduct that establishes—in whole or in part—the instant offense of conviction is properly considered, even as relevant conduct and even if that same conduct also underlies a charge of which the defendant has been acquitted. During the amendment cycle, commenters raised questions about how a court would be able to parse out acquitted conduct in a variety of specific scenarios, including those involving "linked or related charges" or "overlapping conduct" (*e.g.*, conspiracy counts in conjunction with substantive counts or obstruction of justice counts in conjunction with substantive civil rights counts). Commission data demonstrate that cases involving acquitted conduct will be rare. In fiscal year 2022, of 62,529 sentenced individuals, 1,613 were convicted and sentenced after a trial (2.5% of all sentenced individuals), and of those, only 286 (0.4% of all sentenced individuals) were acquitted of at least one offense or found guilty of only a lesser included offense.

To ensure that courts may continue to appropriately sentence defendants for conduct that establishes counts of conviction, rather than define the specific boundaries of "acquitted conduct" and "convicted conduct" in such cases, the Commission determined that the court that presided over the proceeding will be best positioned to determine which conduct can properly be considered as part of relevant conduct based on the individual facts in those cases.

The amendment limits the scope of "acquitted conduct" to only those charges of which the defendant has been acquitted in federal court. This limitation reflects the principles of the dual-sovereignty doctrine and responds to concerns about administrability. The chief concern regarding administrability raised by commenters throughout the amendment cycle was whether courts would be able to parse acquitted conduct from convicted conduct in cases in which some conduct relates to both the acquitted and convicted counts. The Commission appreciates that federal courts may have greater difficulty making this determination if it involves proceedings that occurred in another jurisdiction and at different times.

Third, and finally, the amendment makes corresponding changes to §6A1.3 (Resolution of Disputed Factors (Policy Statement)), restating the principle provided in §1B1.3(c) and further

clarifying that "nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661."

Effective Date: The effective date of this amendment is November 1, 2024.

AMENDMENT 827

AMENDMENT: Section 2B1.1(b)(1) is amended by inserting the following at the end:

"**Notes to Table:*

(A) *Loss.*—Loss is the greater of actual loss or intended loss.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) 'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) 'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) 'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3—

by striking subparagraphs (A) and (B) as follows:

"(A) *General Rule.*—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) *Actual Loss.*—'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) *Intended Loss.*—'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) *Pecuniary Harm.*—'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) *Reasonably Foreseeable Pecuniary Harm.*—For purposes of this guideline, 'reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) *Rules of Construction in Certain Cases.*—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) *Offenses Under 18 U.S.C. § 1030.*—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.";

inserting the following new subparagraph (A):

"(A) *Rules of Construction in Certain Cases.*—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(ii) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) *Offenses Under 18 U.S.C. § 1030.*—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.";

and by redesignating subparagraphs (C), (D), (E), and (F) as subparagraphs (B), (C), (D), and (E), respectively.

The Commentary to §2B2.3 captioned "Application Notes" is amended in Note 2 by striking "the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 3 by striking "Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud) and Application Note 3 of the Commentary to §2B1.1".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(I) by striking "Commentary to §2B1.1 (Theft, Property Destruction, and Fraud)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1".

REASON FOR AMENDMENT: This amendment is a result of the Commission's continued study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary. In *Stinson v. United States*, 508 U.S. 36, 38 (1993), the Supreme Court held that commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Following *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), which limited deference to executive agencies' interpretation of regulations to situations in which the regulation is "genuinely ambiguous," the deference afforded to various guideline commentary provisions has been debated and is the subject of conflicting court decisions.

Applying *Kisor*, the Third Circuit has held that Application Note 3(A) of the commentary to §2B1.1 (Theft, Property Destruction, and Fraud) is not entitled to deference. *See United States v. Banks*, 55 F.4th 246 (3d Cir. 2022). Application Note 3(A) provides a general rule that "loss is the greater of actual loss or intended loss" for purposes of the loss table in §2B1.1(b)(1), which increases an individual's offense level based on loss amount. In *Banks*, the Third Circuit held that "the term 'loss' [wa]s unambiguous in the context of §2B1.1" and that it unambiguously referred to "actual loss." The Third Circuit reasoned that "the commentary expand[ed] the definition of 'loss' by explaining that generally 'loss is the greater of actual loss or intended loss,'" and therefore "accord[ed] the commentary no weight." *Banks*, 55 F.4th at 253, 258.

The loss calculations for individuals in the Third Circuit are now computed differently than elsewhere, where other circuit courts have uniformly applied the general rule in Application

Note 3(A). The Commission estimates that before the *Banks* decision approximately 50 individuals per year were sentenced using intended loss in the Third Circuit.

To ensure consistent loss calculation across circuits, the amendment creates Notes to the loss table in §2B1.1(b)(1) and moves the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes. The amendment also moves rules providing for the use of gain as an alternative measure of loss, as well as the definitions of "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm," from the Commentary to the Notes. In addition, the amendment makes corresponding changes to the Commentary to §§2B2.3 (Trespass), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), and 8A1.2 (Application Instructions — Organizations), which calculate loss by reference to the Commentary to §2B1.1.

While the Commission may undertake a comprehensive review of §2B1.1 in a future amendment cycle, this amendment aims to ensure consistent guideline application in the meantime without taking a position on how loss may be calculated in the future.

Effective Date: The effective date of this amendment is November 1, 2024.

AMENDMENT 828

AMENDMENT:

Part A (§2K2.1(b)(4)(B) Enhancement)

Section 2K2.1(b)(4)(B)(i) is amended by striking "any firearm had an altered or obliterated serial number" and inserting "any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye".

The Commentary to §2K2.1 is amended—

in Note 8(A) by striking "if the offense involved a firearm with an altered or obliterated serial number" and inserting "if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye"; and by striking "This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.";

and in Note 8(B) by striking "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number" and inserting "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye".

Part B (Interaction between §2K2.4 and §3D1.2(c))

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by striking the following:

"*Weapon Enhancement*.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6)(B) would not apply.

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).";

and inserting the following:

"*Non-Applicability of Certain Enhancements*.—

(A) *In General*.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant

is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6)(B) would not apply.

(B) *Impact on Grouping*.—If two or more counts would otherwise group under subsection (c) of §3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under §3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A). Thus, for example, in a case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. § 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. § 924(c), the counts shall be grouped pursuant to §3D1.2(c). The applicable Chapter Two guidelines for the felon-in-possession count and the drug trafficking count each include 'conduct that is treated as a specific offense characteristic' in the other count, but the otherwise applicable enhancements did not apply due to the rules in §2K2.4 related to 18 U.S.C. § 924(c) convictions.

(C) *Upward Departure Provision*.—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).".

REASON FOR AMENDMENT: This amendment addresses circuit conflicts involving §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Part A addresses whether the serial number of a firearm must be illegible for application of the enhancement for an "altered or obliterated" serial number at §2K2.1(b)(4)(B), and Part B addresses whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has an 18 U.S.C. § 924(c) conviction.

Part A – Section 2K2.1(b)(4)(B) Enhancement

Part A of the amendment resolves the differences in how the circuits interpret the term "altered" in the 4-level enhancement at §2K2.1(b)(4)(B), which applies when the serial number of a firearm has been "altered or obliterated." A circuit conflict has arisen as to whether the serial number must be illegible for this enhancement to apply and as to what test for legibility should be employed.

The Sixth and Second Circuits have adopted the naked eye test. The Sixth Circuit held that a serial number must be illegible, noting that "a serial number that is defaced but remains visible to the naked eye is not 'altered or obliterated' under the guideline." *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020). The Sixth Circuit reasoned that "[a]ny person with basic vision and reading ability would be able to tell immediately whether a serial number is legible," and may be less inclined to purchase a firearm without a legible serial number. *Id.* at 717. The Second Circuit followed the Sixth Circuit in holding that "altered" means illegible for the same reasons. *United States v. St. Hilaire*, 960 F.3d 61, 66 (2d Cir. 2020).

By contrast, the Fourth, Fifth, and Eleventh Circuits have upheld the enhancement where a serial number is "less legible." The Fourth Circuit held that "a serial number that is made *less* legible is made different and therefore is altered for purposes of the enhancement." *United States v. Harri*s, 720 F.3d 499, 501 (4th Cir. 2013). The Fifth Circuit similarly affirmed the enhancement even though the damage did not render the serial number unreadable because "the serial number of the firearm [] had been materially changed in a way that made its accurate information less accessible." *United States v. Perez,* 585 F.3d 880, 884 (5th Cir. 2009). In an unpublished opinion, the Eleventh Circuit reasoned that an interpretation where "altered" means illegible "would render 'obliterated' superfluous." *United States v. Millender*, 791 F. App'x 782, 783 (11th Cir. 2019).

This amendment resolves this circuit conflict by amending the enhancement to adopt the holdings of the Second and Sixth Circuits. As amended, the enhancement applies if "any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." This amendment is consistent with the Commission's recognition in 2006 of "both the difficulty in tracing firearms with altered and obliterated serial numbers, and the increased market for these types of weapons." *See* USSG, App. C, amend. 691 (effective Nov. 1, 2006). By employing the "unaided eye" test for legibility, the amendment also seeks to resolve the circuit split and ensure uniform application.

Part B – Grouping: §2K2.4, Application Note 4

Part B resolves a difference among circuits concerning whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c). Section 3D1.2 (Grouping of Closely Related Counts) contains four rules for

determining whether multiple counts should group because they are closely related. Subsection (c) states that counts are grouped together "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." The Commentary to §3D1.2 further explains that "[s]ubsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor."

While there is little disagreement that the felon-in-possession and drug trafficking counts ordinarily group under §3D1.2(c), courts differ regarding the extent to which the presence of the count under 18 U.S.C. § 924(c) prohibits grouping under the guidelines. Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) is applicable to certain statutes with mandatory minimum terms of imprisonment (*e.g.*, 18 U.S.C. § 924(c)). The Commentary to §2K2.4 provides that "[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense."

The Sixth, Eighth, and Eleventh Circuits have held that such counts can group together under §3D1.2(c) because the felon-in-possession convictions and drug trafficking convictions each include conduct that is treated as specific offense characteristics in the other offense, even if those specific offense characteristics do not apply due to §2K2.4. *United States v. Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010); *United States v. Bell*, 477 F.3d 607, 615–16 (8th Cir. 2007); *United States v. King*, 201 F. App'x 715, 718 (11th Cir. 2006). By contrast, the Seventh Circuit has held that felon-in-possession and drug trafficking counts do not group under these circumstances because the grouping rules apply only after the offense level for each count has been determined and "by virtue of §2K2.4, [the counts] did not operate as specific offense characteristics of each other, and the enhancements in §§2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply." *United States v. Sinclair*, 770 F.3d 1148, 1157–58 (7th Cir. 2014).

This amendment revises Application Note 4 to §2K2.4 and reorganizes it into three subparagraphs. Subparagraph A retains the same instruction on the non-applicability of certain enhancements; subparagraph B explains the impact on grouping; and subparagraph C retains the upward departure provision. As amended, subparagraph B resolves the circuit conflict by explicitly instructing that "[i]f two or more counts would otherwise group under subsection (c) of §3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under §3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A)."

This amendment aligns with the holdings of the majority of circuits involved in the circuit conflict. Additionally, this amendment clarifies the Commission's view that promulgation of this Application Note originally was not intended to place any limitations on grouping.

Effective Date: The effective date of this amendment is November 1, 2024.

AMENDMENT 829

AMENDMENT: Section 5H1.1 is amended by striking the following:

"Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by

the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).";

and inserting the following:

"Age may be relevant in determining whether a departure is warranted.

Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

The age-crime curve, one of the most consistent findings in criminology, demonstrates that criminal behavior tends to decrease with age. Age-appropriate interventions and other protective factors may promote desistance from crime. Accordingly, in an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).".

REASON FOR AMENDMENT: This amendment makes several revisions to §5H1.1 (Age (Policy Statement)), which addresses the relevance of age in sentencing. Before the amendment, §5H1.1 provided, in relevant part, that "[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."

The amendment revises the first sentence in §5H1.1 to provide more broadly that "[a]ge may be relevant in determining whether a departure is warranted." It also adds language specifically providing that a downward departure may be warranted in cases in which the defendant was youthful at the time of the instant offense or any prior offenses. In line with the Commission's statutory duty to establish sentencing policies that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 991(b)(1)(C), this amendment reflects the evolving science and data surrounding youthful individuals, including recognition of the age-crime curve and that cognitive changes lasting into the mid-20s affect individual behavior and culpability. The amendment also reflects expert testimony to the Commission indicating that certain risk factors may contribute to youthful involvement in criminal justice systems, while protective factors, including appropriate interventions, may promote desistance from crime.

Effective Date: The effective date of this amendment is November 1, 2024.

AMENDMENT 830

AMENDMENT:

Part A (Export Control Reform Act of 2018)

The Commentary to §2M5.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. § 1705; 50 U.S.C. §§ 4601–4623" and inserting "50 U.S.C. §§ 1705, 4819".

The Commentary to §2M5.1 captioned "Application Notes" is amended—

by striking Notes 1 through 4 as follows:

"1. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

3. In addition to the provisions for imprisonment, 50 U.S.C. § 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is $250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or $1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.

4. For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. § 4605).";

and by inserting the following new Notes 1, 2, and 3:

"1. *Definition*.—For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 1754 of the Export Controls Act of 2018 (50 U.S.C. § 4813).

2. *Additional Penalties*.—In addition to the provisions for imprisonment, 50 U.S.C. § 4819 contains provisions for criminal fines and forfeiture as well as civil penalties.

3. *Departure Provisions*.—

(A) *In General*.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the

extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict*.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.".

Appendix A (Statutory Index) is amended in the line referenced to 50 U.S.C. § 4610 by striking "§ 4610" and inserting "§ 4819".

Part B (Offenses Involving Records and Reports on Monetary Instruments Transactions)

Section 2S1.3(b)(2)(B) is amended by striking "committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period" and inserting "committed the offense while violating another law of the United States or as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period".

Part C (Antitrust Offenses)

The Commentary to §2R1.1 captioned "Statutory Provisions" is amended by striking "§§ 1, 3(b)" and inserting "§§ 1, 3(a)".

The Commentary to §2R1.1 captioned "Application Notes" is amended—

in Note 3 by inserting at the beginning the following new heading: "*Fines for Organizations*.—";

in Note 4 by inserting at the beginning the following new heading: "*Another Consideration in Setting Fine*.—";

in Note 5 by inserting at the beginning the following new heading: "*Use of Alternatives Other Than Imprisonment*.—";

in Note 6 by inserting at the beginning the following new heading: "*Understatement of Seriousness*.—";

and in Note 7 by inserting at the beginning the following new heading: "*Defendant with Previous Antitrust Convictions*.—".

The Commentary to §2R1.1 captioned "Background" is amended by striking "These guidelines apply" and inserting "This guideline applies".

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. § 3(b) by striking "§ 3(b)" and inserting "§ 3(a)".

Part D (Enhanced Penalties for Drug Offenders)

Section 2D1.1(a) is amended by striking paragraphs (1) through (4) as follows:

"(1) 43, if—

(A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that

the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or";

and by inserting the following new paragraphs (1) through (4):

"(1) 43, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) 38, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the statutory term of imprisonment of not less than 20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) 30, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) 26, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

by striking Notes 1 through 4 as follows:

"1. *Definitions*.—

For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

For purposes of subsection (a), 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' have the meaning given those terms in 21 U.S.C. § 802.

2. *'Mixture or Substance'*.—'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

3. *Classification of Controlled Substances*.—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

4. *Applicability to 'Counterfeit' Substances*.—The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.";

and inserting the following new Notes 1 through 4:

"1. *Definition of 'Plant'*.—For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

2. *Application of Subsection (a)*.—Subsection (a) provides base offense levels for offenses under 21 U.S.C. §§ 841 and 960 based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

Subsection (a)(1) provides a base offense level of 43 for offenses under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the mandatory statutory term of life imprisonment applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a serious drug felony, serious violent felony, or felony drug offense.

Subsection (a)(2) provides a base offense level of 38 for offenses under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the statutory minimum term of imprisonment of not less than 20 years to life applies because death or serious bodily injury resulted from the use of the controlled substance.

Subsection (a)(3) provides a base offense level of 30 for offenses under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a felony drug offense.

Subsection (a)(4) provides a base offense level of 26 for offenses under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies because death or serious bodily injury resulted from the use of the controlled substance.

The terms 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' are defined in 21 U.S.C. § 802. The base offense levels in subsections (a)(1) through (a)(4) would also apply if the parties stipulate to the applicable offense described in those provisions for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines) or to any such base offense level.

3. *'Mixture or Substance'*.—'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

4. *In General*.—

(A) *Classification of Controlled Substances*.—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug

Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

(B) *Applicability to 'Counterfeit' Substances*.—The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.".

Part E ("Sex Offense" Definition in §4C1.1 (Adjustment for Certain Zero-Point Offenders))

Section 4C1.1(b)(2) is amended by striking "'Sex offense' means (A) an offense, perpetrated against a minor, under"; and inserting "'Sex offense' means (A) an offense under".

REASON FOR AMENDMENT: This multi-part amendment responds to recently enacted legislation and miscellaneous guideline application issues.

Part A – Export Control Reform Act of 2018

Part A of the amendment amends Appendix A (Statutory Index) to reference the new statutory provisions from the Export Control Reform Act (ECRA) of 2018, enacted as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115–232 (Aug. 13, 2018), to §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism). The ECRA repealed the Export Administration Act (EAA) of 1979 regarding dual-use export controls, previously codified at 50 U.S.C. §§ 4601–4623. At the same time, the Act promulgated new provisions, codified at 50 U.S.C. §§ 4811–4826, relating to export controls for national security and foreign policy purposes. Section 4819 prohibits a willful violation of the Act or attempts and conspiracies to violate any regulation, order, license, or other authorization issued under the Act, with a maximum term of imprisonment of 20 years. Section 4819 replaced the penalty provision of the repealed Act, at 50 U.S.C. § 4610 (Violations), which had been referenced in Appendix A to §2M5.1. The Commission determined that §2M5.1 remains the most analogous guideline for the offenses prohibited under the new section 4819. As such, the amendment revises Appendix A to delete the reference to 50 U.S.C. § 4610 and replaces it with a reference to 50 U.S.C. § 4819, with conforming changes in the Commentary.

Part B – Offenses Involving Records and Reports on Monetary Instruments Transactions

Part B of the amendment revises the 2-level enhancement at subsection (b)(2)(B) of §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts) to better account for certain enhanced penalty provisions in subchapter II (Records and Reports on Monetary Instruments Transactions) of chapter 53 (Monetary Transactions) of title 31 (Money and Finance), United States Code ("subchapter II").

Most substantive criminal offenses in subchapter II are punishable at 31 U.S.C. § 5322 (Criminal penalties). Section 5322(a) provides a maximum term of imprisonment of five years for a simple violation. Section 5322(b) provides an enhanced maximum term of imprisonment of ten years if the offense was committed while "violating another law of the United States or as part

of a pattern of any illegal activity involving more than $100,000 in a 12-month period." Two additional criminal offenses in subchapter II provide substantially similar enhanced maximum terms of imprisonment, at sections 5324(d)(2) (Structuring transactions to evade reporting requirement prohibited) and 5336(h)(3)(B)(ii)(II) (Beneficial ownership information reporting requirements).

While §2S1.3(b)(2)(B) accounted for offenses involving a "a pattern of any illegal activity involving more than $100,000," the Department of Justice raised concerns that it does not address the other aggravating statutory condition of committing the offense while "violating another law of the United States." Addressing these concerns, the Commission determined that an amendment to §2S1.3(b)(2)(B) that expressly provides for this additional alternative factor more fully gives effect to the enhanced penalty provisions provided for in sections 5322(b), 5324(d)(2), and 5336(h)(3)(B)(ii)(II).

Part C – Antitrust Offenses

Part C of the amendment responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A to §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors). In 2002, Congress amended 15 U.S.C. § 3 to create a new criminal offense. *See* Section 14102 of the Antitrust Technical Corrections Act of 2002, Pub. L. 107–273 (Nov. 2, 2002). Prior to the Antitrust Technical Corrections Act of 2002, 15 U.S.C. § 3 contained only one provision prohibiting any contract or combination in the form of trust or otherwise (or any such conspiracy) in restraint of trade or commerce in any territory of the United States or the District of Columbia. The Act redesignated the existing provision as section 3(a) and added a new criminal offense at a new section 3(b). Section 3(b) prohibits monopolization, attempts to monopolize, and combining or conspiring with another person to monopolize any part of the trade or commerce in or involving any territory of the United States or the District of Columbia. 15 U.S.C. § 3(b). At the time, the Commission referenced section 3(b) in Appendix A to §2R1.1 but did not reference section 3(a) to any guideline.

Part C of the amendment amends Appendix A and the Commentary to §2R1.1 to replace the reference to 15 U.S.C. § 3(b) with a reference to 15 U.S.C. § 3(a). This change reflects the fact that §2R1.1 is intended to apply to antitrust offenses involving agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, the type of conduct proscribed at section 3(a), and does not address monopolization offenses, the type of conduct prohibited by section 3(b).

Part D – Enhanced Penalties for Drug Offenders

Part D of the amendment clarifies that the alternative enhanced base offense levels at §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) are based on the offense of conviction, not relevant conduct. Sections 841 and 960 of title 21, United States Code, contain crimes with mandatory minimum penalties for defendants whose instant offense resulted in death or serious bodily injury and crimes with mandatory minimum penalties for defendants with the combination of both an offense resulting in death or serious bodily injury and prior convictions for certain specified offenses. The Commission received public comment and testimony that it was unclear whether the Commission intended for §§2D1.1(a)(1)–(a)(4) to apply only when the defendant was convicted of one of these crimes or whenever a defendant meets the applicable requirements based on relevant conduct.

The amendment resolves the issue by amending §§2D1.1(a)(1)–(4) to clarify that the base offense levels in those provisions apply only when the individual is convicted of an offense under sections 841(b) or 960(b) to which the applicable enhanced statutory mandatory minimum

term of imprisonment applies, or when the parties have stipulated to: (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level. The amendment is intended to clarify the Commission's original intent that the enhanced base offense levels apply because the statutory elements have been established and the defendant was convicted under the enhanced penalty provision provided in sections 841(b) or 960(b). The amendment also responds to comments made by the Federal Public and Community Defenders and the Department of Justice that the enhanced penalties should also apply when the parties stipulate to their application. The amendment also amends the Commentary to §2D1.1 to add an application note explaining the applicable mandatory minimum terms of imprisonment that apply "based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense."

Part E – "Sex Offense" Definition in §4C1.1 (Adjustment for Certain Zero-Point Offenders)

Part E of the amendment responds to concerns that the definition of "sex offense" in subsection (b)(2) of §4C1.1 (Adjustment for Certain Zero-Point Offenders) was too restrictive because it applied only to offenses perpetrated against minors.

In 2023, the Commission added a new Chapter Four guideline at §4C1.1 that provides a 2-level decrease from the offense level determined under Chapters Two and Three for "zero-point" offenders who meet certain criteria. *See* USSG App. C, amend. 821 (effective Nov. 1, 2023). The 2-level decrease applies only if none of the exclusionary criteria set forth in subsections (a)(1) through (a)(10) apply. Among the exclusionary criteria is subsection (a)(5), requiring that "the [defendant's] instant offense of conviction is not a sex offense." Section 4C1.1(b)(2) defined "sex offense" as "(A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition."

The amendment revises the definition of "sex offense" at §4C1.1(b)(2) by striking the phrase "perpetrated against a minor" to ensure that any individual who commits a covered sex offense against any victim, regardless of age, is excluded from receiving the 2-level reduction under §4C1.1. In making this revision, the Commission determined that expanding the definition to cover all conduct in the provisions listed in the definition regardless of the victim's age was appropriate for two reasons. First, given the egregious nature of sexual assault and the gravity of the physical, emotional, and psychological harms that victims experience, the Commission determined that its initial policy determination to treat adult and minor victims differently for purposes of the 2-level reduction should be revised. Second, the Commission concluded that while some individuals would already be excluded from the 2-level reduction if they employed violence or their conduct resulted in death or serious bodily injury to the victim (conduct which is taken into account at §4C1.1(a)(3) and (a)(4), respectively), many serious sex offenses are committed through coercion and other non-violent means and can leave lasting consequences on victims.

Effective Date: The effective date of this amendment is November 1, 2024.

AMENDMENT 831

AMENDMENT: Section 1B1.1(a)(6) is amended by striking "Part B of Chapter Four" and inserting "Parts B and C of Chapter Four".

The Commentary to §1B1.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Frequently Used Terms Defined*.—";

in Note 1(F) by striking "subdivision" and inserting "clause";

in Note 2 by inserting at the beginning the following new heading: "*Definition of Additional Terms*.—"; and by striking "case by case basis" and inserting "case-by-case basis";

in Note 3 by inserting at the beginning the following new heading: "*List of Statutory Provisions*.—";

in Note 4 by inserting at the beginning the following new heading: "*Cumulative Application of Multiple Adjustments*.—";

in Note 4(A) by striking "specific offense characteristic subsection" and inserting "specific offense characteristic"; and by striking "subdivisions" and inserting "subparagraphs";

and in Note 5 by inserting at the beginning the following new heading: "*Two or More Guideline Provisions Equally Applicable*.—".

Chapter Two is amended in the Introductory Commentary by striking "Chapter Four, Part B (Career Offenders and Criminal Livelihood)" and inserting "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

Section 2B1.1(b)(7) is amended by striking "Federal" and inserting "federal"; and by striking "Government" both places such term appears and inserting "government".

Section 2B1.1(b)(17) is amended by striking "subdivision" both places such term appears and inserting "subparagraph".

Section 2B1.1(b)(19)(B) is amended by striking "subdivision" and inserting "subparagraph".

Section 2B1.1(c)(3) is amended by striking "subdivision" and inserting "paragraph".

The Commentary to 2B1.1 captioned "Application Notes" is amended—

in Note 1 by striking "'Equity securities'" and inserting "'Equity security'";

in Note 3(E), as redesignated by Amendment 827, by striking "subdivision (A)" and inserting "subparagraph (A)";

in Note 3(E)(i), as redesignated by Amendment 827, by striking "this subdivision" and inserting "this clause";

in Note 3(E)(viii), as redesignated by Amendment 827, by striking "a Federal health care offense" and inserting "a federal health care offense"; and by striking "Government

health care program" both places such term appears and inserting "government health care program";

and in Note 4(C)(ii) by striking "subdivision" and inserting "subparagraph".

The Commentary to §2B1.6 captioned "Application Notes" is amended in Note 1 by striking "United State Code" both places such term appears and inserting "United States Code"; and by striking "subdivision (B)" and inserting "subparagraph (B)".

Section 2B3.1(b)(3) is amended by striking "subdivisions" both places such term appears and inserting "subparagraphs"; and by striking "cumulative adjustments from (2) and (3)" and inserting "cumulative adjustments from application of paragraphs (2) and (3)".

The Commentary to §2B3.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Definitions*.—";

in Note 2 by inserting at the beginning the following new heading: "*Dangerous Weapon*.—";

in Note 3 by inserting at the beginning the following new heading: "*Definition of 'Loss'*.—";

in Note 4 by inserting at the beginning the following new heading: "*Cumulative Application of Subsections (b)(2) and (b)(3)*.—";

in Note 5 by inserting at the beginning the following new heading: "*Upward Departure Provision*.—";

and in Note 6 by inserting at the beginning the following new heading: "*'A Threat of Death'*.—".

Section 2B3.2(b)(3)(B) is amended by striking "subdivisions" and inserting "clauses".

Section 2B3.2(b)(4) is amended by striking "subdivisions" both places such term appears and inserting "subparagraphs"; and by striking "cumulative adjustments from (3) and (4)" and inserting "cumulative adjustments from application of paragraphs (3) and (4)".

The Commentary to §2B3.2 captioned "Application Notes" is amended—

in Note 2 by inserting at the beginning the following new heading: "*Threat of Injury or Serious Damage*.—";

in Note 3 by inserting at the beginning the following new heading: "*Offenses Involving Public Officials and Other Extortion Offenses*.—";

in Note 4 by inserting at the beginning the following new heading: "*Cumulative Application of Subsections (b)(3) and (b)(4)*.—";

in Note 5 by inserting at the beginning the following new heading: "*Definition of 'Loss to the Victim'*.—";

in Note 6 by inserting at the beginning the following new heading: "*Defendant's Preparation or Ability to Carry Out a Threat*.—";

in Note 7 by inserting at the beginning the following new heading: "*Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims*.—";

and in Note 8 by inserting at the beginning the following new heading: "*Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim*.—".

Section 2C1.8(b)(3) is amended by striking "Federal" and inserting "federal".

The Commentary to §2C1.8 captioned "Application Notes" is amended in Note 2 by striking "Federal" both places such term appears and inserting "federal"; and by striking "Presidential" and inserting "presidential".

Section 2D1.1(b)(14)(C)(ii) is amended by striking "subdivision" and inserting "subparagraph".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

in Note 8(D)—

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

"1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm";

and inserting the following:

"1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg";

and under the heading relating to Schedule III Substances (except Ketamine), by striking "1 unit of a Schedule III Substance" and inserting "1 unit of a Schedule III Substance (except Ketamine)";

and in Note 9, under the heading relating to Hallucinogens, by striking the following:

"2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg";

and inserting the following:

"2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
3,4-Methylenedioxyamphetamine (MDA)	250 mg
3,4-Methylenedioxymethamphetamine (MDMA)	250 mg

Mescaline	500 mg
Phencyclidine (PCP)*	5 mg".

The Commentary to §2D1.1 captioned "Background" is amended by striking "Section 6453 of the Anti-Drug Abuse Act of 1988" and inserting "section 6453 of Public Law 100–690".

The Commentary to §2D1.2 captioned "Background" is amended by striking "Section 6454 of the Anti-Drug Abuse Act of 1988" and inserting "section 6454 of Public Law 100–690".

The Commentary to §2D1.5 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Inapplicability of Chapter Three Adjustment*.—";

in Note 2 by inserting at the beginning the following new heading: "*Upward Departure Provision*.—";

in Note 3 by inserting at the beginning the following new heading: "*'Continuing Series of Violations'*.—";

and in Note 4 by inserting at the beginning the following new heading: "*Multiple Counts*.—".

The Commentary to §2D1.5 captioned "Background" is amended by striking "Title 21 U.S.C. § 848" and inserting "Section 848 of title 21, United States Code,".

Section 2E2.1(b)(2) is amended by striking "subdivisions" both places such term appears and inserting "subparagraphs"; and by striking "the combined increase from (1) and (2)" and inserting "the combined increase from application of paragraphs (1) and (2)".

The Commentary to §2E2.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Definitions*.—";

and in Note 2 by inserting at the beginning the following new heading: "*Interpretation of Specific Offense Characteristics*.—".

Section 2E3.1(a)(1) is amended by striking "subdivision" and inserting "paragraph".

The Commentary to §2E3.1 captioned "Application Notes" is amended in Note 1 by striking "§ 2156(g)" and inserting "§2156(f)".

Section 2H2.1(a)(2) is amended by striking "in (3)" and inserting "in paragraph (3)".

The Commentary to §2H2.1 captioned "Application Note" is amended in Note 1 by inserting at the beginning the following new heading: "*Upward Departure Provision*.—".

Section 2K1.4(b)(2) is amended by striking "under (a)(4)" and inserting "under subsection (a)(4)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 1 by striking "United State Code" both places such term appears and inserting "United States Code".

The Commentary to §2S1.1 captioned "Application Notes" is amended—

in Note 1 by striking "authorized Federal official" and inserting "authorized federal official";

and in Note 4(B)(vi) by striking "subdivisions" and inserting "clauses".

Section 3B1.1(c) is amended by striking "in (a) or (b)" and inserting "in subsection (a) or (b)".

The Commentary to §3B1.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Definition of 'Participant'.*—";

in Note 2 by inserting at the beginning the following new heading: "*Organizer, Leader, Manager, or Supervisor of One or More Participants.*—";

in Note 3 by inserting at the beginning the following new heading: "*'Otherwise Extensive'.*—";

and in Note 4 by inserting at the beginning the following new heading: "*Factors to Consider.*—"; and by striking "decision making" and inserting "decision-making".

The Commentary to §3D1.1 captioned "Application Notes" is amended in Note 2 by inserting at the beginning the following new heading: "*Application of Subsection (b).*—".

The Commentary to §3D1.1 captioned "Background" is amended by striking "Chapter Four, Part B (Career Offenders and Criminal Livelihood)" and inserting "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

The Commentary to §3D1.5 is amended by striking "Chapter Four, Part B (Career Offenders and Criminal Livelihood)" and inserting "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

Section 4A1.1(b) is amended by striking "in (a)" and inserting "in subsection (a)".

Section 4A1.1(c) is amended by striking "in (a) or (b)" and inserting "in subsection (a) or (b)".

Section 4A1.1(d) is amended by striking "under (a), (b), or (c)" and inserting "under subsection (a), (b), or (c)".

The Commentary to §4A1.1 captioned "Application Notes" is amended—

in Note 1, in the heading, by striking "*§4A1.1(a).*" and inserting "*§4A1.1(a).*—";

in Note 2, in the heading, by striking "*§4A1.1(b).*" and inserting "§*4A1.1(b).*—";

in Note 3, in the heading, by striking "*§4A1.1(c).*" and inserting "*§4A1.1(c).*—";

in Note 4, in the heading, by striking "*§4A1.1(d).*" and inserting "*§4A1.1(d).*—";

and in Note 5, in the heading, by striking "*§4A1.1(e).*" and inserting "*§4A1.1(e).*—".

Section 4A1.2(a)(2) is amended by striking "by (A) or (B)" and inserting "by subparagraph (A) or (B)".

Section 4A1.2(d)(2)(B) is amended by striking "in (A)" and inserting "in subparagraph (A)".

Section 4C1.1(a) is amended—

in paragraph (9) by striking "and";

by striking paragraph (10) as follows:

"(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;";

and by inserting at the end the following new paragraphs (10) and (11):

"(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role); and

(11) the defendant was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;".

Section 5E1.2(c)(2) is amended by striking "in (4)" and inserting "in paragraph (4)".

Section 5F1.6 is amended by striking "Federal" and inserting "federal".

The Commentary to 5F1.6 captioned "Application Note" is amended in Note 1 by inserting at the beginning the following new heading: "*Definition of 'Federal Benefit'.*—".

The Commentary to §5G1.2 captioned "Application Notes" is amended—

in Note 1 by striking "*See* Note 3" and inserting "*See* Application Note 3";

in Note 2(A) by striking "subdivision" and inserting "subparagraph";

in Note 4(B)(i) by striking "a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum)" and inserting "a drug trafficking offense (5-year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20-year statutory maximum)";

in Note 4(B)(ii) by striking "one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum)" and inserting "one count of 18 U.S.C. § 924(c) (5-year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20-year statutory maximum)";

and in Note 4(B)(iii) by striking the following:

"The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 113(a)(3) (10 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.";

and inserting the following:

"The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5-year mandatory minimum on each count) and one count of violating 18 U.S.C. § 113(a)(3) (10-year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 262 months is appropriate (applicable guideline range of 262–327 months). The court then imposes (I) a sentence of 82 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 60 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 120 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.".

The Commentary to §5K1.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Sentence Below Statutorily Required Minimum Sentence*.—";

in Note 2 by inserting at the beginning the following new heading: "*Interaction with Acceptance of Responsibility Reduction*.—";

and in Note 3 by inserting at the beginning the following new heading: "*Government's Evaluation of Extent of Defendant's Assistance*.—".

The Commentary to §5K1.1 captioned "Background" is amended by striking "*in camera*" and inserting "in camera".

Section 5K2.0(e) is amended by striking "*in camera*" and inserting "in camera".

The Commentary to §5K2.0 captioned "Application Notes" is amended in Note 3(C) by striking "subdivision" and inserting "subparagraph".

Section 6A1.5 is amended by striking "Federal" and inserting "federal".

The Commentary to §8B2.1 captioned "Application Notes" is amended in Note 4(A) by striking "any Federal, State," and inserting "any federal, state,".

Reason for Amendment: This amendment makes technical, stylistic, and other non-substantive changes to the *Guidelines Manual*.

The amendment makes technical and conforming changes in response to the recent promulgation of §4C1.1 (Adjustment for Certain Zero-Point Offenders), which provides a 2-level decrease for certain defendants who have zero criminal history points. The decrease applies only if none of the exclusionary criteria set forth in subsection (a) applies. Currently, the exclusionary criteria include subsection (a)(10), requiring that "the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." Since promulgation of §4C1.1, several stakeholders have questioned whether either condition in subsection (a)(10) is disqualifying or whether only the combination of both conditions is disqualifying. The Commission intended §4C1.1(a)(10) to track the safety valve criteria at 18 U.S.C. § 3553(f)(4), such that defendants are ineligible for safety valve relief if they either have an aggravating role or engaged in a continuing criminal enterprise. It is not required to demonstrate both. *See, e.g.*, *United States v. Bazel*, 80 F.3d 1140, 1143 (6th Cir. 1996); *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020). To clarify the Commission's intention that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision, the amendment makes technical changes to §4C1.1 to divide subsection (a)(10) into two separate provisions (subsections (a)(10) and (a)(11)).

The amendment also adds references to Chapter Four, Part C (Adjustment for Certain Zero-Point Offenders) in §1B1.1 (Application Instructions), the Introductory Commentary to Chapter Two (Offense Conduct), and the Commentary to §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 3D1.5 (Determining the Total Punishment). These guidelines and commentaries refer to the order in which the provisions of the *Guidelines Manual* should be applied.

Finally, the amendment makes technical and clerical changes to—

- the Commentary to §1B1.1 (Application Instructions), to add headings to some application notes, provide stylistic consistency in how subdivisions are designated, and correct a typographical error;
- §2B1.1 (Theft, Property Destruction, and Fraud), to provide consistency in the use of capitalization and how subdivisions are designated, and to correct a reference to the term "equity security";
- the Commentary to §2B1.6 (Aggravated Identity Theft), to correct some typographical errors and provide stylistic consistency in how subdivisions are designated;
- §2B3.1 (Robbery), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;
- §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), to provide stylistic consistency in how subdivisions are designated and add headings to some application notes in the Commentary;
- §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property), to provide consistency in the use of capitalization;
- §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), to provide stylistic consistency in how subdivisions are designated, make clerical changes to some controlled substance references in the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9, and correct a reference to a statute in the Background Commentary;
- the Background Commentary to §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), to correct a reference to a statute;
- the Commentary to §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), to add headings to application notes and correct a reference to a statutory provision;
- §2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;
- §2E3.1 (Gambling Offenses; Animal Fighting Offenses), to provide stylistic consistency in how subdivisions are designated and correct a reference to a statutory provision in the Commentary;

- §2H2.1 (Obstructing an Election or Registration), to provide stylistic consistency in how subdivisions are designated and add a heading to the application note in the Commentary;

- §2K1.4 (Arson; Property Damage by Use of Explosives), to provide stylistic consistency in how subdivisions are designated;

- the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to correct typographical errors;

- the Commentary to §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), to provide consistency in the use of capitalization and how subdivisions are designated;

- §3B1.1 (Aggravating Role), to provide stylistic consistency in how subdivisions are designated, add headings to the application notes in the Commentary, and correct a typographical error;

- the Commentary to §3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to add a heading to an application note;

- §4A1.1 (Criminal History Category), to provide stylistic consistency in how subdivisions are designated and correct the headings of the application notes in the Commentary;

- §4A1.2 (Definitions and Instructions for Computing Criminal History), to provide stylistic consistency in how subdivisions are designated;

- the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction), to provide stylistic consistency in how subdivisions are designated, fix typographical errors in the Commentary, and update an example that references 18 U.S.C. § 924(c) (which was amended by the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018) to limit the "stacking" of certain mandatory minimum penalties imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense);

- the Commentary to §5K1.1 (Substantial Assistance to Authorities (Policy Statement)), to add headings to application notes and correct a typographical error;

- §5K2.0 (Grounds for Departure (Policy Statement)), to correct a typographical error and provide stylistic consistency in how subdivisions are designated;

- §5E1.2 (Fines for Individual Defendants), to provide stylistic consistency in how subdivisions are designated;

- §5F1.6 (Denial of Federal Benefits to Drug Traffickers and Possessors), to provide consistency in the use of capitalization and add a heading to an application note in the Commentary;

- §6A1.5 (Crime Victims' Rights (Policy Statement)), to provide consistency in the use of capitalization; and

- the Commentary to §8B2.1 (Effective Compliance and Ethics Program), to provide consistency in the use of capitalization.

Effective Date: The effective date of this amendment is November 1, 2024.

AMENDMENT 832

AMENDMENT:

Part A (Circuit Conflict Concerning "Physically Restrained" Enhancements)

Section 2B3.1(b)(2)(B) is amended by striking "if a firearm was otherwise used" and inserting "if a firearm was used to convey a specific (not general) threat of harm (*e.g.*, pointing the firearm at a specific victim or victims; directing the movement of a specific victim or victims with the firearm) or to make physical contact with a victim (*e.g.*, pistol whip; firearm placed against victim's body)".

Section 2B3.1(b)(4)(B) is amended by striking "if any person was physically restrained" and inserting "if any person's freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up,".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by striking "'abducted,' and 'physically restrained' are defined" and inserting "and 'abducted' have the meaning given such terms".

The Commentary to §2B3.1 captioned "Background" is amended by striking "was physically restrained by being tied, bound, or lock up" and inserting "a victim's freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up".

Section 2B3.2(b)(3)(A)(ii) is amended by striking "if a firearm was otherwise used" and inserting "if a firearm was used to convey a specific (not general) threat of harm (*e.g.*, pointing the firearm at a specific victim or victims; directing the movement of a specific victim or victims with the firearm) or to make physical contact with a victim (*e.g.*, pistol whip; firearm placed against victim's body)".

Section 2B3.2(b)(5)(B) is amended by striking "if any person was physically restrained" and inserting "if any person's freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up,".

The Commentary to §2B3.2 captioned "Application Notes" is amended in Note 1 by striking "'physically restrained,'".

Section 2E2.1(b)(1)(B) is amended by striking "if a dangerous weapon (including a firearm) was otherwise used" and inserting "if a dangerous weapon (including a firearm) was used to convey a specific (not general) threat of harm (*e.g.*, pointing the weapon at a specific victim or victims; directing the movement of a specific victim or victims with the weapon) or to make physical contact with a victim (*e.g.*, pistol whip; weapon placed against victim's body)".

Section 2E2.1(b)(3)(B) is amended by striking "if any person was physically restrained" and inserting "if any person's freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up,".

The Commentary to §2E2.1 captioned "Application Notes" is amended in Note 1 by striking "'otherwise used,'"; and by striking "'abducted,' and 'physically restrained'" and inserting "and 'abducted'".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 2 by striking "the defendants actually intended to physically restrain the teller, the specific offense characteristic for physical restraint would be added" and inserting "the defendants actually intended to restrict the teller's freedom of movement through physical contact or confinement, the specific offense characteristic for such restriction would be added".

Part B (Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2))

Section 4A1.2(a)(2) is amended in the paragraph that begins "If the defendant" by inserting after "the second offense)." the following: "For purposes of this provision, a traffic stop is not an intervening arrest.".

REASON FOR AMENDMENT: This two-part amendment addresses circuit conflicts involving §2B3.1 (Robbery) and §4A1.2 (Definitions and Instructions for Computing Criminal History).

Part A – Circuit Conflict Concerning "Physically Restrained" Enhancements

Part A of the amendment responds to a circuit conflict over whether §2B3.1(b)(4)(B)—which provides for a 2-level increase "if any person was physically restrained to facilitate commission of the offense or to facilitate escape"—applies where a robbery victim is restricted from moving at gunpoint but is not otherwise immobilized through measures like those in the definition of "physically restrained" in Application Note 1 to §1B1.1 (Application Instructions) (*i.e.*, "by being tied, bound, or locked up").

The Second, Third, Fifth, Seventh, and Ninth Circuits have largely agreed that the psychological coercion of pointing a gun at a victim, without more, does not qualify, and that a restraint must be "physical" for the enhancement to apply. *See*, *e.g.*, United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999); United States v. Bell, 947 F.3d 49, 57 (3d Cir. 2020); United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017); United States v. Herman, 930 F.3d 872, 877 (7th Cir. 2019); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001). By contrast, the First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim's movement at gunpoint suffices for the enhancement. *See*, *e.g.*, United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006); United States v. Dimache, 665 F.3d 603, 608 (4th Cir. 2011); United States v. Howell, 17 F.4th 673, 692 (6th Cir. 2021); United States v. Miera, 539 F.3d 1232, 1235–36 (10th Cir. 2008); United States v. Deleon, 116 F.4th 1260, 1264 (11th Cir. 2024).

The Commission received public comment and testimony indicating that the conduct at issue in the circuit split (pointing a gun at a victim during a robbery) is treated differently not only under §2B3.1(b)(4)(B) but also under the separate §2B3.1(b)(2) enhancement. Section 2B3.1(b)(2) provides for tiered offense level increases for threats and weapon involvement in a robbery, including a 5-level enhancement "if a firearm was brandished or possessed" and a 6-level enhancement "if a firearm was otherwise used." The terms "brandished" and "otherwise used" are defined in Application Note 1 to §1B1.1.

Circuits that have considered the difference between these definitions generally agree that while "brandished" covers the general display of a weapon, a firearm is "otherwise used" where it is employed for a specific threat. *See, e.g.*, United States v. Jordan, 945 F.3d 245, 264

(5th Cir. 2019) ("While brandishing 'can mean as little as displaying part of a firearm or making the presence of the firearm known in order to intimidate,' otherwise using a weapon includes pointing the weapon at an individual in a specifically threatening manner." (citation omitted)); United States v. Johnson, 803 F.3d 610, 616 (11th Cir. 2015) ("[T]he 'otherwise use[]' of a firearm includes the use of the firearm to make an explicit or implicit threat against a specific person.").

Commission data shows, however, that pointing a gun at a victim during a robbery has resulted in the 5-level "brandished" increase in some cases and the 6-level "otherwise used" increase in others. The combination of these differing applications of the firearms enhancement and the conflict among the circuits regarding the 2-level "physically restrained" enhancement has led to disparities: the total resulting enhancements have ranged from five to eight levels for pointing a gun at a victim during a robbery.

To promote uniformity and consistency in guideline application, Part A of the amendment generally adopts the approach of the Second, Third, Fifth, Seventh, and Ninth Circuits that §2B3.1(b)(4)(B) does not apply solely based on the coercion of using a firearm to restrict a victim's movement. Rather, the increase applies only "if any person's freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape."

Part A of the amendment also revises §2B3.1(b)(2) to ensure that use of a firearm during a robbery is accounted for under this enhancement with more uniformity. It amends §2B3.1(b)(2)(B) to state that the 6-level increase applies "if a firearm was used to convey a specific (not general) threat of harm (*e.g.*, pointing the firearm at a specific victim or victims; directing the movement of a specific victim or victims with the firearm) or to make physical contact with a victim (*e.g.*, pistol whip; firearm placed against victim's body)."

To further promote consistency in application of offense guidelines with similar specific offense characteristics, the amendment makes parallel changes to two Chapter Two guidelines with "physically restrained" and "otherwise used" enhancements: §§2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means). The amendment does not make parallel changes to §3A1.3 (Restraint of Victim), which also uses the term "physically restrained" but differs from §2B3.1(b)(4)(B) in other respects. No inferences as to the scope of that Chapter Three adjustment should be drawn from this amendment.

Part B – Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)

Part B of the amendment addresses a circuit conflict over whether a traffic stop is an "intervening arrest" for purposes of determining whether multiple prior sentences should be "counted separately or treated as a single sentence" when assigning criminal history points ("single-sentence rule") under §4A1.2(a)(2).

The Third, Sixth, Ninth, and Eleventh Circuits have held that a formal, custodial arrest is required, and that a citation or summons following a traffic stop does not qualify. *See* United States v. Ley, 876 F.3d 103, 109 (3d Cir. 2017); United States v. Rogers, 86 F.4th 259, 264–65 (6th Cir. 2023); United States v. Leal-Felix, 665 F.3d 1037, 1041–42 (9th Cir. 2011) (en banc); United States v. Wright, 862 F.3d 1265, 1282 (11th Cir. 2017). By contrast, the Seventh Circuit has adopted a broad view of the term, holding that a traffic stop amounts to an intervening arrest. *See* United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003).

After reviewing public comment and testimony, the Commission determined that a traffic stop should not be considered an "intervening arrest" for purposes of the single-sentence rule. The amendment revises §4A1.2(a)(2) to include that clarification.

Effective Date: The effective date of this amendment is November 1, 2025.

AMENDMENT 833

AMENDMENT:

Part A (Application of Mitigating Role Adjustment in Drug Trafficking Cases)

Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5))

Section 2D1.1(a)(5) is amended by striking "the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level ('minimal participant') reduction in §3B1.2(a), decrease to level 32" and inserting "the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34, decrease by 3 levels; or (iii) above level 34, decrease to level 32. If the resulting offense level is greater than level 30 and the defendant receives the 4-level reduction in §3B1.2(a), decrease to level 30".

Section 2D1.1(b)(17) is amended by striking "('minimal participant')".

Subpart 2 (Special Instruction Relating to §3B1.2)

Section 2D1.1(e) is amended—

in the heading by striking "Instruction" and inserting "Instructions";

and by inserting at the end the following new paragraph (2):

"(2) Application of §3B1.2 (Mitigating Role) to §2D1.1 Cases

(A) Determine whether an adjustment under §3B1.2 (Mitigating Role) applies.

(B) In addition to the circumstances identified in §3B1.2, an adjustment under §3B1.2 is generally warranted if the defendant's primary function in the offense was performing a low-level trafficking function.

(i) An adjustment under §3B1.2(a) is generally warranted if the defendant's primary function in the offense was plainly among the lowest level of drug trafficking functions, such as serving as a courier, running errands, sending or receiving phone calls or messages, or acting as a lookout; or

(ii) an adjustment under §3B1.2(b) is generally warranted if the defendant's primary function in the offense was performing another low-level

trafficking function, such as distributing controlled substances in user-level quantities for little or no monetary compensation or with a primary motivation other than profit (*e.g.*, the defendant was otherwise unlikely to commit such an offense and was motivated by an intimate or familial relationship, or by threats or fear to commit the offense).

For purposes of subsection (e)(2)(B), the provisions of §3B1.2 apply in determining whether a mitigating role adjustment is warranted, except that the adjustment shall apply regardless of whether the offense involved other participants in addition to the defendant, and regardless of whether the defendant was substantially less culpable than the average participant in the criminal activity. The extent of the adjustment shall be based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

(C) The mitigating role provisions at subsection (a)(5) and the 2-level reduction at subsection (b)(17) apply regardless of whether the defendant receives the required adjustment from §3B1.2 (Mitigating Role) by direct application of §3B1.2 or by use of the special instruction in subsection (e)(2)(B).".

The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by striking the following:

"A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.";

and inserting the following:

"A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.".

Part B (Representing or Marketing Fentanyl or a Fentanyl Analogue as a Legitimately Manufactured Drug)

Section 2D1.1(b)(13)(B) is amended by striking "and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug" and inserting "with reckless disregard that such mixture or substance was not the legitimately manufactured drug".

REASON FOR AMENDMENT: This two-part amendment is the result of Commission study on the operation of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). As part of its study, the Commission considered feedback from the field, including at a roundtable discussion on drug sentencing, a public hearing, and public comment. The Commission also analyzed a range of drug trafficking sentencing data, including data on sentences imposed at the highest base offense levels, the application of the "mitigating role cap" and mitigating role adjustment, sentences imposed based on function, and the application of enhancements in fentanyl and fentanyl analogue cases. The Commission determined that targeted changes were warranted to ensure appropriate penalties commensurate with an individual's function in a drug trafficking offense and to better address the harms of representing or marketing fentanyl or a fentanyl analogue as a legitimately manufactured drug.

Part A – Application of Mitigating Role Adjustment in Drug Trafficking Cases

Part A of the amendment contains two subparts to address concerns that §2D1.1 and §3B1.2 (Mitigating Role) as they currently apply in tandem do not adequately account for the lower culpability of individuals performing low-level functions in a drug trafficking offense.

Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5))

Subpart 1 of Part A amends the mitigating role provisions in §2D1.1(a)(5) to refine the drug trafficking guideline in cases where an individual receives an adjustment under §3B1.2. The Commission initially added the mitigating role cap to "somewhat limit[] the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions." USSG App. C, amend. 640 (effective Nov. 1, 2002). As previously amended, §2D1.1(a)(5) provided a graduated 2-, 3-, or 4-level decrease, depending on the base offense level under §2D1.1(c), when a defendant received a mitigating role adjustment under §3B1.2. USSG App. C, amend. 668 (effective Nov. 1, 2004).

This amendment maintains the approach of graduated decreases depending on the base offense level but amends §2D1.1(a)(5) in two ways. First, it sets a mitigating role cap at level 32 if the defendant receives an adjustment under §3B1.2 and has a base offense level above level 34. Second, if the defendant has a resulting offense level greater than level 30 and receives a 4-level adjustment under §3B1.2(a), then a mitigating role cap of level 30 applies.

As explained further below in Subpart 2, the mitigating role provisions in §2D1.1(a)(5) and the 2-level reduction at §2D1.1(b)(17) apply regardless of whether the defendant receives the required adjustment from §3B1.2 by direct application of §3B1.2 or by use of the new special instruction in §2D1.1(e)(2)(B). Thus, the amendment deletes the phrase "minimal participant" from §2D1.1(a)(5) and §2D1.1(b)(17) to clarify that those provisions are triggered regardless of whether a defendant receives a 4-level reduction by direct application of §3B1.2(a) or by use of the new special instruction in §2D1.1(e)(2)(B).

Subpart 2 (Special Instruction Relating to §3B1.2)

Subpart 2 of Part A adds a new special instruction at §2D1.1(e) to address the inconsistent application of §3B1.2 in §2D1.1 cases and to encourage broader use of §3B1.2 in these cases.

Section 3B1.2 provides a range of reductions depending on the defendant's role in the criminal activity. Subsection (a) sets forth a 4-level reduction if the defendant was a "minimal participant in any criminal activity." Subsection (b) sets forth a 2-level reduction if the defendant was "a minor participant in any criminal activity." Section 3B1.2 also provides for a 3-level reduction where the case "fall[s] between (a) and (b)."

The Commission previously amended the Commentary to §3B1.2 to increase its usage (*see, e.g.*, USSG App. C, amend. 794 (effective Nov. 1, 2015)). However, Commission data shows that the prior amendment did not result in a sustained increase in application of the mitigating role adjustment in §2D1.1 cases. Commission data show that when §3B1.2 is applied in §2D1.1 cases, the vast majority of these cases receive only a 2-level reduction; 3- and 4-level reductions are rarely applied. Furthermore, Commission data shows variations across districts in application of §3B1.2 to §2D1.1 cases. The new special instruction at §2D1.1(e) addresses the application of §3B1.2 to §2D1.1 cases as follows.

The amendment expands the circumstances in which an adjustment under §3B1.2 is warranted in §2D1.1 cases by instructing courts that an adjustment is generally warranted if the defendant's "primary function" in the offense was performing a low-level trafficking function. Section 2D1.1(e)(2)(A) directs the court to determine whether an adjustment under §3B1.2 applies as a court already does under the *Guidelines Manual*. Section 2D1.1(e)(2)(B) then provides that, in addition to the circumstances identified in §3B1.2, an adjustment under §3B1.2 is generally warranted if the defendant's primary function in the offense was performing a low-level trafficking function. Thus, a defendant sentenced under §2D1.1 may qualify for a mitigating role adjustment under §3B1.2 by direct application of that adjustment or by use of the special instruction in §2D1.1(e)(2)(B).

To ensure courts focus on a defendant's predominant trafficking-related activities, the Commission selected "primary function" to guide courts in determining whether an adjustment is appropriate. Due to the wide variety of functions performed by individuals in drug trafficking offenses, the examples listed in §2D1.1(e)(2)(B) are illustrative rather than a definitive list.

To assist courts in determining the appropriate level of reduction, the amendment provides examples of functions generally warranting an adjustment under §3B1.2(a) and (b). Section 2D1.1(e)(2)(B)(i) states that a four-level adjustment under §3B1.2(a) is generally warranted if the defendant's primary function in the offense was plainly among the lowest level of drug trafficking functions. It lists as examples serving as a courier, running errands, sending or receiving phone calls or messages, or acting as a lookout. Section 2D1.1(e)(2)(B)(ii) states that a two-level adjustment under §3B1.2(b) is generally warranted if the defendant's primary function in the offense was another low-level trafficking function. It lists as examples distributing controlled substances in user-level quantities for little or no monetary compensation or with a primary motivation other than profit (*e.g.*, the defendant was otherwise unlikely to commit such an offense and was motivated by an intimate or familial relationship or by threats or fear to commit the offense).

The amendment places the special instruction in §2D1.1 instead of §3B1.2 to highlight that the rules for determining §3B1.2 eligibility are different in §2D1.1 cases. For purposes of the special instruction at §2D1.1(e)(2)(B), the provisions of §3B1.2 apply in determining whether a mitigating role adjustment is warranted, with two exceptions: the amendment provides that the adjustment shall apply regardless of whether the offense involved other participants in

addition to the defendant, and also regardless of whether the defendant was substantially less culpable than the average participant in the criminal activity. The Commission determined that these two provisions in the Commentary to §3B1.2 may discourage a court from applying a mitigating role adjustment in single-defendant drug trafficking cases or drug trafficking cases where the defendant performed a similar low-level function as other participants in the criminal activity, but an adjustment may nevertheless be appropriate. Accordingly, the Commission concluded that these provisions shall not apply in assessing whether a mitigating role adjustment is warranted based on a defendant's low-level function in a drug trafficking offense.

The amendment specifies that the mitigating role provisions in §2D1.1(a)(5) and the 2-level reduction at §2D1.1(b)(17) apply regardless of whether the defendant receives the §3B1.2 adjustment by direct application of §3B1.2 or by use of the special instruction in §2D1.1(e)(2)(B). This instruction ensures that any individual who receives a mitigating role adjustment, regardless of the mechanism, may also receive the reductions in §2D1.1(a)(5) and §2D1.1(b)(17).

Part B – Representing or Marketing Fentanyl or a Fentanyl Analogue as a Legitimately Manufactured Drug

Part B of the amendment changes the *mens rea* requirement in §2D1.1(b)(13)(B). In light of the continuing danger associated with the misrepresentation of fake prescription pills containing fentanyl or a fentanyl analogue, the Commission addressed concerns that the *mens rea* requirement was vague and difficult to apply.

Section 2D1.1(b)(13)(A) provides a 4-level increase when the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. The Commission added this specific offense characteristic in 2018 in response to rising numbers of fentanyl and fentanyl analogue cases. *See* USSG, App. C. amend. 807 (effective Nov. 1, 2018). In 2023, the Commission added an alternative 2-level enhancement at §2D1.1(b)(13)(B) for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. The Commission added this specific offense characteristic based on the continued increase in fentanyl and fentanyl analogue distribution and data showing that most fake prescription pills seized containing fentanyl had a potentially lethal dose of the substance. *See* USSG, App. C. amend. 818 (effective Nov. 1, 2023).

The Commission received comment that §2D1.1(b)(13)(B) is being applied inconsistently, in part, because the current *mens rea* requirement has generated confusion. In particular, commenters have urged the Commission to revise §2D1.1(b)(13)(B) because the mental state of "willful blindness or conscious avoidance of knowledge" is vague, and cases construe willful blindness as legally equivalent to knowledge, causing uncertainty over when the enhancement should be applied. The Commission further heard concerns about the continuing dangers associated with representing or marketing fentanyl or a fentanyl analogue as a legitimately manufactured drug.

Informed by those concerns, the amendment changes the *mens rea* requirement in §2D1.1(b)(13)(B) from "willful blindness or conscious avoidance of knowledge" to "reckless disregard."

Effective Date: The effective date of this amendment is November 1, 2025.

AMENDMENT 834

AMENDMENT: Section 2K2.1(b) is amended—

in paragraph (3)(B) by striking "subdivision" and inserting "paragraph";

by redesignating paragraphs (5) through (9) as paragraphs (6) through (10), respectively;

by inserting after paragraph (4) the following new paragraph (5):

"(5) (Apply the Greatest) If the defendant—

(A) (i) possessed four or more machinegun conversion devices; or (ii) transferred or sold any machinegun conversion device to another person, or attempted or conspired to commit such a transfer or sale, increase by 2 levels; or

(B) possessed 30 or more machinegun conversion devices, increase by 4 levels.

For purposes of subsection (b)(5), 'machinegun conversion device' means any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun (*i.e.,* any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger).";

in the paragraph that begins "The cumulative offense level" by striking "(b)(4)" and inserting "(b)(5)";

in paragraph (6) (as so redesignated), in the subparagraph that begins "*Provided*, however," by striking "(b)(5)(C)(i)(I)" and inserting "(b)(6)(C)(i)(I)";

in paragraph (9)(A) (as so redesignated) by striking "(b)(5)" and inserting "(b)(6)";

and in paragraph (10)(A) (as so redesignated) by striking "(b)(5)" and inserting "(b)(6)".

The Commentary to §2K2.1 caption "Application Notes" is amended—

in Note 1, in the paragraph that begins "'Firearm' has the meaning" by inserting after "18 U.S.C. § 921(a)(3)" the following: ", unless otherwise specified";

in Note 3 by striking "(b)(5)" and inserting "(b)(6)";

in Note 9 by striking "*Application of Subsection (b)(7).*—Under subsection (b)(7), if a recordkeeping offense" and inserting "*Application of Subsection (b)(8).*—Under subsection (b)(8), if a recordkeeping offense";

in Note 13—

in the heading by striking "(b)(5)" and inserting "(b)(6)";

and in subparagraph (C) by striking "(b)(5)" and inserting "(b)(6)"; and by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

and in Note 14—

in the heading by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

in subparagraph (A) by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

in subparagraph (B) by striking "(b)(6)(B)" both places it appears and inserting "(b)(7)(B)";

in subparagraph (C) by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

and in subparagraph (E) by striking "(b)(6)(B)" each place it appears and inserting "(b)(7)(B)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4(A) in the paragraph that begins "If the explosive" by striking "§2K2.1(b)(6)(B)" both places it appears and inserting "§2K2.1(b)(7)(B)".

REASON FOR AMENDMENT: This amendment revises §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), the primary firearms guideline, to more fully account for machinegun conversion devices (MCDs).

Commonly referred to as "Glock switches" and "auto sears," MCDs are devices designed to convert semi-automatic firearms into fully automatic weapons. Under the National Firearms Act (NFA), the definition of "machinegun" includes "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." 26 U.S.C. § 5845(b). An MCD therefore qualifies as a machinegun under federal law, and—as in the case of other machineguns—federal law generally prohibits the possession and transfer of such devices, with limited exceptions. *See* 18 U.S.C. § 922(o).

As a technical matter, the definition of "firearm" is not uniform throughout federal law. Because the NFA defines "firearm" to include machineguns—and "machinegun" to include MCDs—MCDs qualify as "firearms" under the NFA definition at 26 U.S.C. § 5845(a). By contrast, MCDs are not firearms under the definition of that term provided in the Gun Control Act (GCA), which is limited (as relevant) to a weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" and "the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3).

Prior to this amendment, §2K2.1 accounted for MCDs solely through base offense levels. It provided certain enhanced base offense levels for offenses involving NFA firearms, including MCDs. *See* USSG §2K2.1(a)(1), (3), (4), (5). Although §2K2.1's base offense levels specifically incorporated the NFA definition of firearm, the remainder of §2K2.1 used the GCA definition. *See* USSG §2K2.1, comment. (n.1). Therefore, MCDs did not trigger the specific offense characteristics in §2K2.1. For example, if an individual were convicted of a firearms offense in which he possessed one semi-automatic firearm and five MCDs, an enhanced base offense level would apply because the offense involved a firearm described in 26 U.S.C. § 5845(a), *see* USSG §2K2.1(a)(1), (3), (4), (5), but there would be no enhancement under the specific offense characteristic at §2K2.1(b)(1) for the number of MCDs possessed because MCDs are not firearms under the GCA definition. *See* USSG §2K2.1(b)(1). For the same reason, if the individual transferred the MCDs to another person, this conduct would not support a trafficking enhancement under the specific offense characteristic at §2K2.1(b)(5) the way the transfer of a GCA firearm (or ammunition) would. *See* USSG §2K2.1(b)(5).

The Commission's amendment responds to concerns by the Department of Justice and other commenters about the proliferation of MCDs, which pose a heightened danger to the public because a weapon equipped with an MCD fires more rapidly and with less control than an

identical weapon without an MCD. Of note, the Department of Justice pointed to a 570% rise in MCD recoveries in 2021 as compared to 2017 and to the growing involvement of automatic gunfire reported in shootings. Commission data similarly reflects a recent rise in firearms cases involving MCDs. In fiscal year 2023, 4.5 percent of cases sentenced under §2K2.1 involved an MCD—an increase from one percent of §2K2.1 cases in fiscal year 2019. While most cases involving MCDs in fiscal year 2023 involved a single MCD, more than 18 percent involved four or more devices. In addition, in more than 25 percent of §2K2.1 cases involving MCDs, the sentenced individual transferred at least one MCD to another person.

To address these concerns and in recognition that MCDs pose different risks than functional firearms, the amendment establishes a new tiered specific offense characteristic at §2K2.1(b)(5) for cases involving MCDs. New subsection (b)(5)(A) provides a two-level enhancement when a defendant (i) possessed four or more MCDs or (ii) transferred or sold an MCD or attempted or conspired to commit such a transfer or sale. New subsection (b)(5)(B) provides a four-level enhancement when a defendant possessed 30 or more MCDs. The amendment includes a definition of "machinegun conversion device" consistent with the NFA's statutory definition at 26 U.S.C. § 5845(b). To tailor the enhancement to the most culpable conduct, the Commission determined that it should apply only to the acts of the defendant. The Commission also concluded that the new specific offense characteristic should be subject to the offense level cap in §2K2.1. The amendment revises the cap to provide that the cumulative offense level may not exceed level 29 after application of subsections (b)(1) through the new subsection (b)(5), unless subsection (b)(3)(A) applies.

The amendment also includes conforming changes, including to the Commentary to §2K2.1 and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to address the renumbering of the prior §2K2.1(b)(5) through (9).

Effective Date: The effective date of this amendment is November 1, 2025.

AMENDMENT 835

AMENDMENT: The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 8(B) by inserting after "18 U.S.C. § 3583(e)(1)." the following: "*See* §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)).".

The Commentary to §4B1.5 captioned "Application Notes" is amended in Note 5 by striking the following:

"*Treatment and Monitoring.*—

(A) *Recommended Maximum Term of Supervised Release.*—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) *Recommended Conditions of Probation and Supervised Release.*—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.";

and by inserting the following:

"*Treatment and Monitoring.*—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.".

Section 5B1.3(d)(7) is amended by striking ", as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)".

The Commentary to §5B1.3 captioned "Application Note" is amended—

in the caption by striking "Note" and inserting "Notes";

and by inserting at the end the following new Note 2:

"2. *Application of Subsection (d)(7).*—For purposes of subsection (d)(7):

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a record-keeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.".

Chapter Five, Part D is amended by inserting at the beginning the following new Introductory Commentary:

"

Introductory Commentary

The Sentencing Reform Act of 1984 requires the court to assess a wide range of factors 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release.' 18 U.S.C. § 3583(c). These determinations aim to make the imposition and scope of supervised release 'dependent on the needs of the defendant for supervision.' *See* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983). In conducting such an individualized assessment, the court can 'assure that [those] who will need post-release supervision will receive it' while 'prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them.' *Id*. at 54; *see also Johnson v. United States,* 529 U.S. 694, 709 (2000) ('Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it . . . . Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most.'). Supervised release 'fulfills rehabilitative ends, distinct from those served by incarceration.' *United States v. Johnson*, 529 U.S. 53, 59 (2000). Accordingly, a court should consider whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety. *See* 18 U.S.C. §§ 3583(c), 3553(a)(2)(C)); *see also* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983) (indicating that a 'primary goal of [a term of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant

who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release').".

Section 5D1.1 is amended—

by striking subsections (a) and (b) as follows:

"(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (*see* 18 U.S.C. § 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.

(b) The court may order a term of supervised release to follow imprisonment in any other case. *See* 18 U.S.C. § 3583(a).";

and inserting the following new subsections (a) and (b):

"(a) The court shall order a term of supervised release to follow imprisonment when required by statute (*see* 18 U.S.C. § 3583(a)).

(b) When a term of supervised release is not required by statute, the court should order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision.";

and by inserting at the end the following new subsection (d):

"(d) The court should state in open court the reasons for imposing or not imposing a term of supervised release. *See* 18 U.S.C. § 3553(c).".

The Commentary to §5D1.1 captioned "Application Notes" is amended—

by striking Notes 1, 2, and 3 as follows:

"1. *Application of Subsection (a).*—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.

2. *Application of Subsection (b).*—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.

3. *Factors to Be Considered.*—

(A) *Statutory Factors.*—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) the nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(iv) the need to provide restitution to any victims of the offense.

See 18 U.S.C. § 3583(c).

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

(D) *Domestic Violence.*—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.";

by redesignating Notes 4 and 5 as Notes 5 and 6, respectively;

by inserting at the beginning the following new Notes 1, 2, 3, and 4:

"1. *Individualized Assessment.*—The statutory framework of supervised release aims to 'assure that [those] who will need post-release supervision will receive it' while 'prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them.' *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983). To that end, 18 U.S.C. § 3583(c) requires the court to, 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release,' consider the following:

(A) the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. § 3553(a)(1));

(B) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(B)–(D));

(C) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines (18 U.S.C. § 3553(a)(4));

(D) any pertinent policy statement issued by the Sentencing Commission (18 U.S.C. § 3553(a)(5));

(E) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (18 U.S.C. § 3553(a)(6)); and

(F) the need to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7)).

See 18 U.S.C. § 3583(c).

2. *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in Application Note 1(A) above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

3. *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

4. *Domestic Violence.*—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.";

and by inserting at the end the following new Note 7:

"7. *Evidence-Based Recidivism Reduction Programming.*—Whether a defendant's sentence includes a term of supervised release may impact the application of time credits earned by the defendant under the First Step Act of 2018, Pub. L. 115–391. The First Step Act of 2018 allows individuals in custody who successfully complete evidence-based recidivism reduction programming or productive activities to earn time credits. *See* 18 U.S.C. § 3632(d)(4)(A). Regarding the application of those time credits, the First Step Act of 2018 provides: 'If the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [18 U.S.C. § 3583], the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under [18 U.S.C. § 3632].' 18 U.S.C. § 3624(g)(3).".

Section 5D1.2 is amended—

by striking subsections (a), (b), and (c) as follows:

"(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).

(2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. *See* 18 U.S.C. § 3583(b)(3).

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.";

and by inserting the following new subsections (a) and (b):

"(a) If a term of supervised release is ordered, the court shall conduct an individualized assessment to determine the length of the term, which shall not be less than any statutorily required minimum term. Except as otherwise provided by statute, the maximum term of supervised release is as follows:

(1) Not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).

(2) Not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).

(3) Not more than one year for a defendant convicted of a Class E felony or a misdemeanor (other than a petty offense). *See* 18 U.S.C. § 3583(b)(3).

(b) The court should state in open court the reasons for the length of the term imposed. *See* 18 U.S.C. § 3553(c).".

The Commentary to §5D1.2 captioned "Application Notes" is amended—

by striking Note 1 as follows:

"1. *Definitions*.—For purposes of this guideline:

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a record-keeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.";

by striking Notes 4, 5, and 6 as follows:

"4. *Factors Considered.*—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.

5. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

6. *Application of Subsection (c).*—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.

For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to

life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum — a life term of supervised release — be imposed.";

by redesignating Notes 2 and 3 as Notes 4 and 5, respectively;

by inserting at the beginning the following new Notes 1, 2, and 3:

"1. *Individualized Assessment.*—When conducting an individualized assessment to determine the length of a term of supervised release, the factors to be considered are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is sufficient, but not greater than necessary, to address the purposes of imposing supervised release on the defendant.

2. *Terrorism and Sex Offenses.*—Congress has authorized a term of supervised release that exceeds the maximum terms described in subsection (a) for certain serious offenses. *See* 18 U.S.C. § 3583(j), (k). For certain terrorism offenses, the authorized term of supervised release is any term of years or life. 18 U.S.C. § 3583(j). For certain sex offenses, the authorized term of supervised release is any term of years not less than five, or up to life. 18 U.S.C. § 3583(k).

3. *Drug Offenses.*—For certain drug offenses, Congress has established statutory minimum terms of supervised release. *See, e.g.*, 21 U.S.C. §§ 841(b), 960(b) (providing minimum terms of supervised release depending on drug type and quantity and criminal history).";

in Note 4 (as so redesignated) by striking "shall be determined" and inserting "is determined";

in Note 5 (as so redesignated) by striking "or the guidelines";

and by inserting at the end the following new Note 6:

"6. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2); §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)).".

The Commentary to §5D1.2 is amended by striking the Commentary captioned "Background" in its entirety as follows:

"*Background:* This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.".

Section 5D1.3 is amended—

by striking subsections (b), (c), (d), and (e) as follows:

"(b) *Discretionary Conditions*

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) *'Standard' Conditions (Policy Statement)*

The following 'standard' conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the

change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(d) *'Special' Conditions (Policy Statement)*

The following 'special' conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) *Support of Dependents*

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(2) *Debt Obligations*

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) *Access to Financial Information*

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) *Substance Abuse*

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) *Mental Health Program Participation*

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) *Deportation*

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) *Sex Offenses*

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(8) *Unpaid Restitution, Fines, or Special Assessments*

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(e) *Additional Conditions (Policy Statement)*

The following 'special conditions' may be appropriate on a case-by-case basis:

(1) *Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* §5F1.1 (Community Confinement).

(2) *Home Detention*

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* §5F1.2 (Home Detention).

(3) *Community Service*

Community service may be imposed as a condition of supervised release. *See* §5F1.3 (Community Service).

(4) *Occupational Restrictions*

Occupational restrictions may be imposed as a condition of supervised release. *See* §5F1.5 (Occupational Restrictions).

(5) *Curfew*

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) *Intermittent Confinement*

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).";

and inserting at the end the following new subsection (b):

"(b) *Discretionary Conditions*

(1) *In General.*—The court should conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted.

Such conditions are warranted to the extent that they (A) are reasonably related to (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (iii) the need to protect the public from further crimes of the defendant; and (iv) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (B) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3583(d).

(2) *'Standard' Conditions (Policy Statement)*

The following are 'standard' conditions of supervised release, which the court may modify, expand, or omit in appropriate cases:

(A) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(B) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(C) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(D) The defendant shall answer truthfully the questions asked by the probation officer.

(E) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(F) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(G) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(H) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(I) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(J) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(K) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(L) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(M) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(3) *'Special' Conditions (Policy Statement)*

One or more conditions from the following non-exhaustive list of 'special' conditions of supervised release may be appropriate in a particular case, including in the circumstances described therein:

(A) *Support of Dependents*

(i) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(ii) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(B) *Debt Obligations*

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(C) *Access to Financial Information*

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(D) *Substance Abuse*

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (i) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (ii) a condition specifying that the defendant shall not use or possess alcohol.

(E) *Mental Health Program Participation*

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(F) *Deportation*

If (i) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (ii) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(G) *Sex Offenses*

If the instant offense of conviction is a sex offense—

(i) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(ii) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(iii) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(iv) A condition prohibiting the defendant from communicating, or otherwise interacting, with any victim of the offense, either directly or through someone else.

(H) *Unpaid Restitution, Fines, or Special Assessments*

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(I) *Educational or Vocational Training*

If the court has reason to believe that a course of study or vocational training would be appropriate and would equip the defendant for suitable employment, a condition specifying that the defendant participate in a General Education Development (or similar) program, vocational training, or skills training, unless the probation officer excuses the defendant from doing so.

(J) *Victim Contact*

If there is an identifiable victim of the offense, a condition prohibiting the defendant from communicating, or otherwise interacting, with any of the victims, either directly or through someone else.

(K) *Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* §5F1.1 (Community Confinement).

(L) *Home Detention*

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* §5F1.2 (Home Detention).

(M) *Community Service*

Community service may be imposed as a condition of supervised release. *See* §5F1.3 (Community Service).

(N) *Occupational Restrictions*

Occupational restrictions may be imposed as a condition of supervised release. *See* §5F1.5 (Occupational Restrictions).

(O) *Curfew*

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(P) *Intermittent Confinement*

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).".

The Commentary to §5D1.3 captioned "Applications Note" is amended—

in the caption by striking "Note" and inserting "Notes";

by redesignating Note 1 as Note 2;

by inserting at the beginning the following new Note 1:

"1. *Individualized Assessment.*—When conducting an individualized assessment under this section, the court must consider the same factors used to determine whether to impose a term of supervised release, and shall impose conditions of supervision not required by statute only to the extent such conditions meet the requirements listed at 18 U.S.C. § 3583(d). *See* 18 U.S.C. § 3583(c), (d); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).";

in Note 2 (as so redesignated) by striking "(c)(4)" both places it appears and inserting "(b)(2)(D)";

and by inserting at the end the following new Note 3:

"3. *Application of Subsection (b)(3)(G).*— For purposes of subsection (b)(3)(G):

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a record-keeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.".

Chapter Five, Part D is amended by inserting at the end the following new §5D1.4:

"§5D1.4. *Modification, Early Termination, and Extension of Supervised Release (Policy Statement)*

(a) *Modification of Conditions.*—At any time prior to the expiration or termination of the term of supervised release, the court may modify, reduce, or enlarge the conditions of supervised release whenever warranted by an individualized assessment of the appropriateness of existing conditions. *See* 18 U.S.C. § 3583(e)(2). The court is encouraged to conduct such an assessment in consultation with the probation officer after the defendant's release from imprisonment.

(b) *Early Termination.*—Any time after the expiration of one year of supervised release and after an individualized assessment of the need for ongoing supervision, the court may terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and in the interest of justice. *See* 18 U.S.C. § 3583(e)(1).

(c) *Extending a Term of Supervised Release.*—The court may, at any time prior to the expiration or termination of a term of supervised release, extend the term of supervised release if less than the maximum authorized term of supervised release was previously imposed and the extension is warranted by an individualized assessment of the need for further supervision. *See* 18 U.S.C. § 3583(e)(2).

Commentary

Application Notes:

1. *Individualized Assessment.*—

(A) *In General.*—When making an individualized assessment under this section, the factors to be considered are the same factors used to determine whether to

impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

(B) *Early Termination.*—When determining whether to terminate the remaining term of supervised release under subsection (b), the court may wish to consider such factors as:

(i) any history of court-reported violations over the term of supervision;

(ii) the ability of the defendant to lawfully self-manage (*e.g.,* the ability to problem-solve and avoid situations that may result in a violation of a condition of supervised release or new criminal charges);

(iii) the defendant's substantial compliance with all conditions of supervision;

(iv) the defendant's engagement in appropriate prosocial activities and the existence or lack of prosocial support to remain lawful beyond the period of supervision;

(v) a demonstrated reduction in risk level or maintenance of the lowest category of risk over the period of supervision; and

(vi) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information provided by the victims of the offense, and other factors the court finds relevant.

2. *Notification of Victims.*—When determining whether to modify any condition of supervised release that would be relevant to a victim or to terminate the remaining term of supervised release, the Commission encourages the court, in coordination with the government, to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

3. *Application of Subsection (c).*—Subsection (c) addresses a court's authority to extend a term of supervised release. In some cases, extending a term may be more appropriate than taking other measures, such as revoking the term of supervised release.".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 4(C) by striking "Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release)" and inserting "Application Note 3 and subsection (f) of §7B1.3 (Revocation of Probation)".

Section 5H1.3 is amended in the paragraph that begins "Mental and emotional conditions may be relevant in determining the conditions" by striking "5D1.3(d)(5)" and inserting "5D1.3(b)(3)(E)".

Section 5H1.4 is amended in the paragraph that begins "Drug or alcohol dependence or abuse" by striking "§5D1.3(d)(4)" and inserting "§5D1.3(b)(3)(D)".

Amendment 835

Chapter Seven, Part A is amended—

in Subpart 1 by striking the following:

" Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements.";

and inserting the following:

" Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. The Commission chose to promulgate policy statements only. These policy statements were intended to provide guidance and allow for the identification of any substantive or procedural issues that require further review. The Commission viewed these policy statements as evolutionary and intended to review relevant data and materials concerning revocation determinations under these policy statements. Updated policies would be issued after federal judges, probation officers, practitioners, and others had the opportunity to evaluate and comment on these policy statements.";

in Subpart 3(a), in the paragraph that begins "Moreover, the Commission" by striking "anticipates" and inserting "anticipated"; by striking "will provide" and inserting "would provide"; by striking "represent" and inserting "represented"; and by striking "intends to promulgate revocation guidelines" and inserting "intended to promulgate updated revocation policies";

in Subpart 3(b)—

in the paragraph that begins "The Commission debated" by striking "debated" and inserting "initially debated";

and in the paragraph that begins "Given the relatively narrow ranges" by striking "this time" and inserting "that time";

in Subpart 4—

in the paragraph that begins "The revocation policy statements" by striking "categorize" and inserting "categorized"; and by striking "fix" and inserting "fixed";

and in the paragraph that begins "The Commission" by striking "has elected" and inserting "initially elected"; by striking "the Commission determined" and inserting "the Commission had determined"; and by striking "the Commission has initially concluded" and inserting "the Commission initially concluded";

by striking Subpart 5 as follows:

"*5. A Concluding Note*

The Commission views these policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission expects to issue revocation guidelines after judges, probation officers, and practitioners have had an opportunity to apply and comment on the policy statements.

In developing these policy statements, the Commission assembled two outside working groups of experienced probation officers representing every circuit in the nation, officials from the Probation Division of the Administrative Office of the U.S. Courts, the General Counsel's office at the Administrative Office of the U.S. Courts, and the U.S. Parole Commission. In addition, a number of federal judges, members of the Criminal Law and Probation Administration Committee of the Judicial Conference, and representatives from the Department of Justice and federal and community defenders provided considerable input into this effort.";

and by inserting at the end the following new Subpart 5:

"*5. Updating the Approach*

The Commission viewed the original policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission intended to revise its approach after judges, probation officers, and practitioners had an opportunity to apply and comment on the policy statements. Since the promulgation of those policy statements, a broad array of stakeholders has identified the need for more flexible, individualized responses to violations of supervised release.

In response, the Commission updated the policy statements in this chapter to ensure judges have the discretion necessary to properly manage supervised release. The revised policy statements encourage judges to take an individualized approach in: (1) responding to reports of non-compliance before initiating revocation proceedings; (2) addressing violations found during revocation proceedings; and (3) imposing a sentence of imprisonment upon revocation. These changes are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants.

This chapter proceeds in two parts: Part B addresses violations of probation, and Part C addresses violations of supervised release. Both parts maintain an approach in which the court addresses primarily the defendant's failure to comply with court-ordered conditions, while reflecting, to a limited degree, the seriousness of the underlying violation and the criminal history of the individual. The Commission determined that violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves all the goals of sentencing, including punishment, supervised release primarily 'fulfills rehabilitative ends, distinct from those served by incarceration.' *United States v. Johnson*, 529 U.S. 53, 59 (2000). In light of these differences, Part B continues to recommend revocation for most probation violations. Part C encourages courts to consider a graduated response to a violation of supervised release, including considering all available options focused on facilitating a defendant's transition into the community and promoting public safety. Parts B and C both recognize the important role of the court, which is best situated to consider the individual defendant's risks and needs and respond accordingly within its broad discretion.".

Chapter Seven, Part B is amended—

in the heading by striking "Probation and Supervised Release Violations" and inserting "Violations of Probation";

and in the Introductory Commentary—

in the paragraph that begins "The policy statements" by striking "chapter" and inserting "part"; and by striking "supervision" and inserting "probation";

by striking the following paragraph:

" Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.";

by striking the last paragraph as follows:

" This chapter is applicable in the case of a defendant under supervision for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this chapter does not apply in the case of a defendant under supervision for a Class B or C misdemeanor or an infraction.";

and by inserting at the end the following new paragraph:

" This part is applicable in the case of a defendant on probation for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this part does not apply in the case of a defendant on probation for a Class B or C misdemeanor or an infraction.".

Section 7B1.1 is amended—

in subsection (a) by striking "and supervised release";

in subsection (a)(3) by striking "supervision" and inserting "probation";

and in subsection (b) by striking "supervision" and inserting "probation".

The Commentary to §7B1.1 captioned "Application Notes" is amended—

in Note 1 by striking "18 U.S.C. §§ 3563(a)(1) and 3583(d), a mandatory condition of probation and supervised release" and inserting "18 U.S.C. § 3563(a)(1), a mandatory condition of probation";

and in Note 5 by striking "under supervision" and inserting "on probation".

Section 7B1.2 is amended in the heading by striking "and Supervised Release".

Section 7B1.3 is amended—

in the heading by striking "or Supervised Release";

in subsection (a)(1) by striking "or supervised release";

in subsection (a)(2) by striking "(A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision" and inserting "(A) revoke probation; or (B) extend the term of probation and/or modify the conditions thereof";

in subsection (b) by striking "or supervised release";

in subsection (e) by striking "or supervised release" both places such phrase appears;

in subsection (f) by striking "or supervised release" both places such phrase appears;

in subsection (g) by striking the following:

"(1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.

(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).";

and inserting the following:

"If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.".

The Commentary to §7B1.3 captioned "Application Notes" is amended—

in Note 1 by striking "or supervised release"; and by striking "supervision" both places such term appears and inserting "probation";

by striking Note 2 as follows:

"2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g)–(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.";

by redesignating Notes 3, 4, and 5 as Notes 2, 3, and 4, respectively;

in Note 2 (as so redesignated) by striking "or supervised release"; and by striking "Bureau of Prisons" and inserting "Federal Bureau of Prisons";

in Note 3 (as so redesignated) by striking "or supervised release" both places such phrase appears;

and in Note 4 (as so redesignated) by striking ". Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement)" and inserting "; *see also* §5F1.8 (Intermittent Confinement)".

Section 7B1.4 is amended in the heading by striking "*Imprisonment*" and inserting "*Imprisonment—Probation*".

Section 7B1.4(a) is amended in the Table—

in the heading by striking "*Revocation Table*" and inserting "*Probation Revocation Table*";

and by striking the following:

"*Grade A* *(1)* Except as provided in subdivision (2) below:

12–18 15–21 18–24 24–30 30–37 33–41.

(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:

24–30 27–33 30–37 37–46 46–57 51–63.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.";

and inserting the following:

"*Grade A* 12–18 15–21 18–24 24–30 30–37 33–41.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of probation.".

The Commentary to §7B1.4 captioned "Application Notes" is amended—

in Note 1 by striking the following:

"The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§4A1.1–4B1.4.)";

and inserting the following:

"The criminal history category to be used in determining the applicable range of imprisonment in the Probation Revocation Table is the category determined at the time the defendant originally was sentenced to the term of probation. The criminal history category is not to be recalculated because the ranges set forth in the Probation Revocation Table have been designed to take into account that the defendant violated probation. *Example:* A defendant, who was originally sentenced in 2022, was determined to have a criminal history category of II due in part to having committed the offense 'while under any criminal justice sentence.' *See* §4A1.1(d) (Criminal History Category) (Nov. 2021). For purposes of determining the applicable range of imprisonment in the Probation Revocation Table, the defendant's criminal history category is

category II, regardless of whether the defendant's criminal history category would be reduced for other purposes based on the retroactive application of Part A of Amendment 821 pursuant to §1B1.10 (Reduction of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). *See* USSG App. C, Amendment 825 (effective November 1, 2023).

In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of probation being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of probation. (*See* the criminal history provisions of §§4A1.1–4B1.4.)";

in Note 2 by striking "Revocation Table" and inserting "Probation Revocation Table"; and by striking "supervision" both places such term appears and inserting "probation";

in Note 3 by striking "under supervision" and inserting "on probation";

in Note 5 by striking "or supervised release" both places such phrase appears; and by striking "18 U.S.C. §§ 3565(b), 3583(g)" and inserting "18 U.S.C. § 3565(b)";

and in Note 6 by striking "under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d)" and inserting "under 18 U.S.C. § 3565(b). 18 U.S.C. § 3563(a)".

Section 7B1.5 is amended—

in the heading by striking "*Under Supervision*" and inserting "*on Probation*";

by striking subsections (a), (b), and (c) as follows:

"(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

(c) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.";

and inserting the following:

"Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.".

The Commentary to §7B1.5 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. Subsection (c) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.".

The Commentary to §7B1.5 captioned "Background" is amended by striking "or supervised release"; by striking "with supervision" and inserting "with probation"; and by striking "under supervision" and inserting "on probation".

Chapter Seven is amended by inserting at the end the following new Part C:

"

Part C—Violations of Supervised Release

Introductory Commentary

At the time of original sentencing, the court may—and in some cases, must—impose a term of supervised release to follow the sentence of imprisonment. *See* 18 U.S.C. § 3583(a). During that term, the court may receive allegations that the defendant has violated a condition of supervision. In responding to such allegations, addressing a violation found during revocation proceedings, and imposing a sentence upon revocation, the court should conduct the same kind of individualized assessment used 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release.' *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

If the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release under existing conditions, modify the conditions, extend the term, or revoke supervised release and impose a term of imprisonment. *See* 18 U.S.C. § 3583(e)(3). The court also has authority to terminate a term of supervised release and discharge the defendant at any time after the expiration of one year of supervised release if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice. 18 U.S.C. § 3583(e)(1).

Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety. If revocation is mandated by statute or the court otherwise determines revocation to be appropriate, the sentence imposed upon revocation should be tailored to address the failure to abide by the conditions of the court-ordered supervision; imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence. The determination of the appropriate sentence on any new criminal conviction that is also a basis of the violation should be a separate determination for the court having jurisdiction over such conviction.

§7C1.1. *Classification of Violations (Policy Statement)*

(a) There are four grades of supervised release violations:

(1) *Grade A Violations* — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) *Grade B Violations* — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) *Grade C Violations* — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervised release.

(b) Where there is more than one violation of the conditions of supervised release, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. § 3583(d), a mandatory condition of supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. 'Crime of violence' is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

3. 'Controlled substance offense' is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.

4. A 'firearm or destructive device of a type described in 26 U.S.C. § 5845(a)' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is on supervised release in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term 'generally' is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

§7C1.2. *Reporting of Violations of Supervised Release (Policy Statement)*

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

§7C1.3. *Responses to Violations of Supervised Release (Policy Statement)*

(a) *Report of Non-Compliance.*—Upon receiving a report that the defendant is in non-compliance with a condition of supervised release, the court should conduct an individualized assessment to determine what response, if any, is appropriate.

(b) *Finding of a Violation.*—Upon a finding of a violation for which revocation is required by statute (*see* 18 U.S.C. § 3583(g)), the court shall revoke supervised release. Upon a finding of any other violation, the court should conduct an individualized assessment, taking into consideration the grade of the violation, to determine whether to revoke supervised release. Revocation is generally appropriate for a Grade A violation, often appropriate for a Grade B violation, and may be appropriate for a Grade C violation.

Commentary

Application Notes:

1. *Individualized Assessment.*—When making an individualized assessment under this section, the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. *Responses.*—Upon a report of non-compliance or a finding of a violation, the court may take any appropriate action provided under 18 U.S.C. § 3583, which includes extension, modification, revocation, or termination of supervised release. If revocation is not statutorily required, the court may also consider an informal response, such as issuing a warning while maintaining supervised release without modification, continuing the violation hearing to provide the defendant time to come into compliance, or directing the defendant to additional resources needed to come into compliance.

3. *Issuing Summons.*—If the defendant's presence in court is required to address a report of non-compliance, the court should consider issuing a summons rather than an arrest warrant where appropriate.

§7C1.4. *Revocation of Supervised Release (Policy Statement)*

(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)).

(b) Any term of imprisonment imposed upon the revocation of supervised release generally should be ordered to be served consecutively to any sentence of im-

prisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.

(c) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).

Commentary

Application Notes:

1. *Individualized Assessment.*—When making an individualized assessment under subsection (a), the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g)–(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.

3. In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

4. Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7C1.5 (Term of Imprisonment—Supervised Release), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

§7C1.5. *Term of Imprisonment—Supervised Release (Policy Statement)*

Unless otherwise required by statute, and subject to an individualized assessment, the recommended range of imprisonment applicable upon revocation is set forth in the following table:

Supervised Release Revocation Table
(in months of imprisonment)

Grade of Violation		*Criminal History Category**					
		I	*II*	*III*	*IV*	*V*	*VI*
Grade C		3–9	4–10	5–11	6–12	7–13	8–14
Grade B		4–10	6–12	8–14	12–18	18–24	21–27
Grade A	*(1)*	Except as provided in subdivision (2) below:					
		12–18	15–21	18–24	24–30	30–37	33–41
	(2)	Where the defendant was on supervised release as a result of a sentence for a Class A felony:					
		24–30	27–33	30–37	37–46	46–57	51–63.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervised release.

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Supervised Release Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Supervised Release Revocation Table have been designed to take into account that the defendant violated supervision. *Example:* A defendant, who was originally sentenced in 2022, was determined to have a criminal history category of II due in part to having committed the offense 'while under any criminal justice sentence.' *See* §4A1.1(d) (Criminal History Category) (Nov. 2021). For purposes of determining the applicable range of imprisonment in the Supervised Release Revocation Table, the defendant's criminal history category is category II, regardless of whether the defendant's criminal history category would be reduced for other purposes based on the retroactive application of Part A of Amendment 821 pursuant to §1B1.10 (Reduction of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). *See* USSG App. C, Amendment 825 (effective November 1, 2023).

   In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§4A1.1–4B1.4.)

2. Departure from the applicable range of imprisonment in the Supervised Release Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervised release. Additionally, an upward departure may be warranted when a defendant, subsequent to

the federal sentence resulting in supervised release, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, under supervised release for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.

5. Upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. § 3583(g).

6. The availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, may warrant an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. § 3583(g). 18 U.S.C. § 3583(d).

§7C1.6. *No Credit for Time Under Supervision (Policy Statement)*

(a) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision. *See* 18 U.S.C. § 3583(e)(3).

(b) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.

Commentary

Application Note:

1. Subsection (b) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.

Background: This section provides that time served on supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with supervision conditions and adjustment while under supervision, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.".

REASON FOR AMENDMENT: This amendment updates the *Guidelines Manual*'s approach to supervised release by revising Part D (Supervised Release) of Chapter Five (Determining the Sentence) and Chapter Seven (Violations of Probation and Supervised Release).

The Sentencing Reform Act of 1984 established "supervised release" as a tool a court could use to impose post-release supervision on a defendant sentenced to a term of imprisonment.

See 18 U.S.C. § 3583. The primary goal of supervised release is to "ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison . . . but still needs supervision and training programs after release." S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983). Supervised release also functions as an important tool to promote public safety. *See* 18 U.S.C. §§ 3583(c), 3553(a)(2)(C).

While statutes mandate the imposition and minimum length of supervised release in some cases, courts generally have discretion to determine whether to impose supervised release, to set its length and conditions, modify those conditions, and to extend, revoke, or terminate the term. In making these decisions, the Act requires courts to examine a set of factors similar, but not identical, to those considered when imposing a sentence. *Compare* 18 U.S.C. § 3553(a) *with* 18 U.S.C. § 3583(c)–(e).

In November 2024, the Commission held a roundtable on supervised release attended by judges, retired federal probation officers, providers of reentry services, academics, federal probation, government and defense community representatives, and a reentry program graduate. The Commission also received extensive public comment and testimony from members of Congress, the Committee on Criminal Law of the Judicial Conference of the United States, the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, law professors, currently and formerly incarcerated individuals, and other criminal justice system stakeholders.

The amendment makes several overarching changes in response to this feedback and consistent with the statutory purposes and framework. First, it emphasizes the importance of judges making individualized decisions about supervised release at all relevant stages—including imposition, modification or extension, and revocation. Second, it underscores the authority of courts, in consultation with the probation officer, to reassess supervised release decisions after a defendant's release from imprisonment, including decisions about the length and conditions of supervision. Third, it underscores the rehabilitative purposes of supervised release by dividing the provisions addressing violations of probation and violations of supervised release into separate parts of Chapter Seven and providing courts with greater discretion to respond to a violation of a condition of supervised release, including where appropriate, through alternatives to revocation and imprisonment.

The amendment's specific changes to Chapters Five and Seven are discussed further below.

Chapter Five, Part D (Supervised Release)

The amendment revises Chapter Five, Part D of the *Guidelines Manual* to provide courts with greater discretion to impose a term of supervised release that is appropriate for the individual defendant. The amendment adds Introductory Commentary, revises each existing guideline, and adds a new policy statement at §5D1.4, which addresses extending or terminating supervised release or modifying the conditions thereof.

Introductory Commentary

The amendment adds Introductory Commentary to Part D of Chapter Five emphasizing that supervised release is intended to ease a defendant's transition into the community, provide needed rehabilitation, and promote public safety. It highlights the importance of conducting an individualized assessment to determine whether a defendant needs supervision and how to appropriately tailor the term and conditions, as required by 18 U.S.C. § 3583(c).

§5D1.1 (Imposition of a Term of Supervised Release)

The amendment revises §5D1.1 to provide greater judicial discretion in determining whether any term of supervised release is warranted. The amendment removes the requirement to impose supervised release whenever the sentence of imprisonment is more than one year and instead requires supervised release only when mandated by statute. In any other case, "the court should order a term of supervised release when warranted by an individualized assessment of the need for supervision." Application Note 1 defines the "individualized assessment" by reference to the 18 U.S.C. § 3553(a) factors that courts must consider under 18 U.S.C. § 3583(c). The Commentary to §5D1.1 continues to instruct courts to consider the defendant's criminal history, substance abuse history, and history of domestic violence in determining whether to impose a term of supervised release.

These changes respond to widespread concern that supervised release often is ordered reflexively, potentially diverting supervision resources from individuals who most need them. Commission data shows that courts currently impose supervised release in most cases (82.5%). This focus on an individualized assessment aims to "assure that [individuals] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them," as Congress intended. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983).

The amendment also adds new §5D1.1(d), which instructs that "the court should state in open court the reasons for imposing or not imposing a term of supervised release," consistent with 18 U.S.C. § 3553(c).

Finally, it adds new Application Note 7, which alerts courts to the fact that the decision whether to impose a term of supervised release could affect subsequent application of First Step Act earned time credits.

§5D1.2 (Term of Supervised Release)

The amendment revises §5D1.2 to provide courts with greater discretion in determining the appropriate length of the term of supervised release. It removes the recommended minimum terms by class of offense from §5D1.2(a) and instead instructs the court to conduct an individualized assessment to determine the length of the term, which shall be not less than any statutorily required minimum term. It continues to list the maximum terms of supervised release by offense class, noting that some statutes may provide for a different term. Application Note 1 provides that the factors considered for purposes of determining the length of the term are the same as the factors considered in determining whether to impose a term and—consistent with 18 U.S.C. §§ 3583(c) and 3553(a)—instructs that the court should ensure the term "is sufficient, but not greater than necessary, to address the purposes of imposing supervised release on the defendant."

Similar to the changes made to §5D1.1, the amendment adds a new instruction to §5D1.2 that "the court should state in open court the reasons for the length of the term imposed."

Additionally, the amendment removes the policy statement recommending the statutory maximum term of supervised release for sex offense cases. Although imposition of a statutory maximum term may be warranted in certain cases, the amendment leaves the appropriate term to the court's discretion. As a related change, the amendment deletes a similar maximum-term recommendation in the Commentary to §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), but it continues to recommend that treatment and monitoring be considered as special conditions of supervised release for individuals sentenced under that guideline.

Finally, in Application Notes 2 and 3, the amendment advises that Congress has authorized higher statutory maximum and/or minimum terms of supervised release for certain terrorism and sex offenses and for some drug offenses.

§5D1.3 (Conditions of Supervised Release)

Section 5D1.3 sets forth mandatory and discretionary conditions of supervised release. Discretionary conditions currently are further subdivided into "standard," "special," and additional conditions. The amendment restructures and revises the discretionary conditions of supervised release in four ways. First, it adds a general instruction at §5D1.3(b)(1), which provides that the court "should conduct an individualized assessment to determine what, if any," discretionary conditions are warranted. Second, in §5D1.3(b)(2), it removes the instruction that "standard" conditions "are recommended for supervised release" and instead clarifies that they "may be modified, omitted, or expanded in appropriate cases." Third, in §5D1.3(b)(3), it removes the recommendation of imposing "special" conditions for listed circumstances and instead provides that "[o]ne or more conditions from the . . . non-exhaustive list of 'special conditions' may be appropriate in a particular case, including" the described circumstances. Fourth, it removes the "additional conditions" subheading and incorporates those conditions into the list of "special" conditions in §5D1.3(b)(3).

These changes emphasize that any standard, special, or other discretionary conditions of supervised release—*i.e.*, those not required by statute—should be imposed only when warranted by an individualized assessment, reflecting the requirements of 18 U.S.C. § 3583(d) and feedback that certain conditions are at times imposed by default. The Commission nonetheless recognizes the value of a list of "standard" conditions that establish basic behavioral expectations and facilitate probation officers' supervision. Accordingly, the amendment maintains the list of "standard" conditions without change but notes the court's authority to impose and adjust them as appropriate.

The amendment also adds three "special" conditions in response to commenters' concerns about cases where victims need special protection and cases where defendants could benefit from educational programs. The revised §5D1.3 lists the following as "special" conditions: (1) a condition prohibiting the defendant from interacting with any victim if the instant conviction is a sex offense; (2) a condition prohibiting the defendant from interacting with any identifiable victim, applicable to all offenses generally; and (3) a condition that the defendant participate in a General Education Development (or similar) program, vocational training, or skills training if the court has reason to believe it would be appropriate and would equip the defendant for suitable employment.

New §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement))

The Commission sought to address with this amendment potential issues surrounding the fact that the terms and conditions of supervised release are imposed at original sentencing, often years before the defendant begins supervision. People and their circumstances may change in and after prison, such that the original term and conditions may no longer be appropriate after the defendant's release. Courts are encouraged to consider modifying the terms and conditions of supervised release whenever changed individual circumstances so warrant.

While Commentary to §5D1.2 previously noted the court's authority to terminate or extend supervised release and encouraged courts to "exercise this authority in appropriate cases," the amendment adds a new policy statement at §5D1.4 to more directly address a court's statutory authority to modify conditions or to terminate or extend the term of supervised release.

Subsection (a) (Modification of Conditions) restates the court's authority under 18 U.S.C. § 3583(e)(2) to modify, reduce, or enlarge the conditions of supervised release and encourages the court to conduct an individualized assessment, in consultation with the probation officer, to determine whether any change to the conditions is warranted after a defendant's release from imprisonment. The Commission received feedback that while probation officers often meet with defendants approaching and after their release, judicial involvement varies by jurisdiction and individual court practice. The Commission believes that more consistent judicial participation in revisiting the conditions of supervised release will facilitate successful reintegration, increase compliance, and promote public safety, and, therefore, it is encouraged as a best practice.

To encourage appropriate use of early termination, subsection (b) (Early Termination) restates the court's authority under 18 U.S.C. § 3583(e)(1) to terminate the remaining term of supervision any time after one year of supervised release if the court determines, following consultation with the government and the probation officer, that termination is warranted by the conduct of the defendant and in the interest of justice. Application Note 1(B) specifies factors a court might consider in determining whether to terminate the remaining term of supervised release, which are modeled in part after the factors in the *Guide to Judiciary Policy*, Vol. 8E, Ch. 3, § 360.20. Considering early termination at appropriate intervals will help ensure that resources are allocated to the individuals most in need of continued supervision and that the term is "sufficient, but not greater than necessary" to fulfill the purposes of imposing supervision. *See* 18 U.S.C. § 3583(c); 18 U.S.C. § 3553(a); USSG §5D1.2 comment. (n.1) (as revised by this amendment).

Subsection (c) (Extending a Term of Supervised Release) provides that the court may extend the term of supervised release any time before the expiration of a term if less than the maximum term was imposed and extension is warranted by an individualized assessment of the need for further supervision. Application Note 3 notes that extending a term may be more appropriate than revoking a term of supervised release in some cases.

Application Note 2 encourages the court, in coordination with the government, to ensure that any victim is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

Conforming Changes

The amendment also makes conforming changes to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), §5B1.3 (Conditions of Probation), §5H1.3 (Mental and Emotional Conditions (Policy Statement)), and §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)).

Chapter Seven (Violations of Probation and Supervised Release)

The amendment revises Chapter Seven of the *Guidelines Manual* in two main ways to underscore the different purposes of probation and supervised release. First, it divides Chapter Seven into Part B (Violations of Probation) and Part C (Violations of Supervised Release) to reflect that probation serves all the goals of sentencing, including punishment, while supervised release primarily "fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000). Second, it responds to stakeholder

feedback on the need for a more flexible, individualized approach to supervised release violations by encouraging courts to consider a graduated response to a defendant's non-compliant behavior.

Chapter Seven – Part A (Introduction to Chapter Seven)

The amendment revises the Introduction to Chapter Seven to explain the Commission's updated approach that treats violations of probation and supervised release differently. To highlight the primarily rehabilitative purposes of supervised release, the new introductory language encourages courts to consider graduated responses to non-compliant behavior before revoking supervised release. The Commission believes that a graduated approach will better allocate resources, promote public safety, and facilitate the reentry and rehabilitation of defendants on supervised release.

Chapter Seven – Part B (Violations of Probation)

The amendment removes references to supervised release from Chapter Seven, Part B and adds an example to the commentary of §7B1.4 (criminal history calculation) that mirrors an addition to the commentary of new §7C1.5. The provisions in Chapter Seven, Part B are otherwise unchanged, reflecting the Commission's determination that violations of probation and supervised release should be treated differently.

Chapter Seven – Part C (Violations of Supervised Release), Introductory Commentary

The amendment includes Introductory Commentary to new Part C of Chapter Seven, which explains that in responding to a report of non-compliance, addressing a violation found during revocation proceedings, or imposing a sentence upon revocation, the court should conduct the same kind of individualized assessment used when imposing supervised release. The introduction highlights the Commission's view that courts should consider a wide array of options to address violations of supervised release and that any sentence imposed upon revocation should be tailored to address the failure to abide by supervision conditions, as imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence.

New §7C1.1 (Classification of Violations (Policy Statement)) and §7C1.2 (Reporting of Violations of Supervised Release (Policy Statement))

The amendment duplicates §§7B1.1 and 7B1.2 into new §§7C1.1 and 7C1.2 and retains the three existing grades of supervised release violations.

§7C1.3 (Responses to Violations of Supervised Release (Policy Statement))

New §7C1.3 identifies actions a court may take in response to a report of non-compliance with supervised release conditions or a finding of a violation. This new policy statement underscores the importance of using a graduated response to non-compliant behavior.

Subsection (a) instructs the court to conduct an individualized assessment to determine what, if any, response is appropriate to a report of non-compliance. New §7C1.3(a) reflects feedback that supervision is a dynamic process and often benefits from regular communication between the defendant, the probation officer, and the court.

Subsection (b) instructs the court to (1) revoke supervised release upon a finding of a violation for which revocation is required by statute, and (2) upon a finding of any other violation, con-

duct an individualized assessment, taking into consideration the grade of the violation, to determine whether to revoke supervised release for any other violation. New §7C1.3(b) further provides that revocation is generally appropriate for a Grade A violation, often appropriate for a Grade B violation, and may be appropriate for a Grade C violation. While revocation previously was required for both Grade A or B violations—and Commission data shows similar rates of prison-only revocations for both grades in recent years, *see* U.S. SENT'G COMM., FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 35 & Fig.13 (2020)—the amendment provides flexibility to assess the seriousness of the underlying conduct and account for any jurisdictional differences affecting the grade assigned to similar conduct.

For both reports of non-compliance and findings of a violation, Application Note 2 references the court's authority to "take any appropriate action provided under 18 U.S.C. § 3583" and lists certain informal responses the court also may consider.

New Application Note 3 encourages the court to consider issuing a summons, rather than an arrest warrant, when appropriate, reflecting concerns that an arrest may result in unnecessary collateral consequences.

§7C1.4 (Revocation of Supervised Release (Policy Statement))

The amendment adds new §7C1.4, which, in subsection (a), instructs the court to conduct an individualized assessment to determine the appropriate length of the term of imprisonment upon revocation, given the recommended ranges set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)).

Subsection (b) directs that any term of imprisonment "generally should" be ordered to be served consecutively to any sentence of imprisonment that the defendant is currently serving. This language replaces the former instruction that terms of imprisonment upon revocation "shall" be ordered to be served consecutively. This new provision continues to underscore the seriousness of violation conduct while reserving flexibility for courts to run sentences concurrently in extraordinary cases where justified.

Subsection (c) retains the instruction from the prior version of §7B1.3(g)(2) which, consistent with 18 U.S.C. § 3583(h), allows a court to reimpose a term of supervised release upon release from a term of imprisonment imposed upon revocation.

New Application Note 3 adopts and modifies §7B1.3(c)(3) to state that "[i]n the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction *generally* is not recommended" (emphasis added).

New Application Note 4 adopts and modifies §7B1.3(d) to instruct that sentencing obligations that remain unpaid or unserved at the time of revocation "should" be ordered to be paid or served in addition to any sentence imposed upon revocation.

§7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement))

The new §7C1.5 adopts and modifies §7B1.4 to set forth the Supervised Release Revocation Table and affirms the importance of conducting an individualized assessment to determine the length of a revocation sentence, in addition to consulting the recommended ranges in the Supervised Release Revocation Table.

The amendment adds an example to Application Note 1 to clarify that a defendant's criminal history category for purposes of determining the applicable range of imprisonment is not recalculated to reflect an amendment made retroactive under §1B1.10 (Reduction of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). It adds the same example to the commentary to §7B1.4 (Term of Imprisonment—Probation (Policy Statement)).

§7C1.6 (No Credit for Time Under Supervision (Policy Statement))

The amendment adds §7C1.6, which duplicates §7B1.5(b) and (c).

Effective Date: The effective date of this amendment is November 1, 2025.

AMENDMENT 836

AMENDMENT: Chapter One is amended by striking Part A as follows:

" PART A — INTRODUCTION AND AUTHORITY

Introductory Commentary

Subparts 1 and 2 of this Part provide an introduction to the Guidelines Manual describing the historical development and evolution of the federal sentencing guidelines. Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States Sentencing Commission ('Commission') when it promulgated the initial set of guidelines and therefore provides a useful reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.

Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

1. *Authority*

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. *The Statutory Mission*

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. *The Basic Approach (Policy Statement)*

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a

substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity — sentencing every offender to five years — destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspond-

ingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. *The Guidelines' Resolution of Major Issues (Policy Statement)*

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) *Real Offense vs. Charge Offense Sentencing*.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for

example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) *Departures*.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (*See* USSG App. C, amendment 768.)

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write

and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover — unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) *Plea Agreements*.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) *Probation and Split Sentences*.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .' 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention.* The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.**

*Note: The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (*See* USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a 'nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.' (*See* USSG App. C, amendment 801.) In 2023, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for 'zero-point' offenders who meet certain criteria. In addition, the Commission further amended the Commentary to §5C1.1 to address the alternatives to incarceration available to 'zero-point' offenders by revising the application note in §5C1.1 that addressed 'nonviolent first offenders' to focus on 'zero-point' offenders. (*See* USSG App. C, amendment 821.)

**Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)

(e) *Multi-Count Convictions*.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment — sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (*e.g.*, separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when non-fungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) *Regulatory Offenses*.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in

the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (*e.g.*, 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) *Sentencing Ranges*.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) *The Sentencing Table.*

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. *A Concluding Note*

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

2. CONTINUING EVOLUTION AND ROLE OF THE GUIDELINES

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for

sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

> Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, . . . [w]e have no doubt that in the hands of the Commission 'the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act.

Id. at 379 (internal quotation marks and citations omitted).

The continuing importance of the guidelines in federal sentencing was further acknowledged by the Court in *United States v. Booker*, 543 U.S. 220 (2005), even as that case rendered the guidelines advisory in nature. In *Booker*, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court concluded that an advisory guideline system would 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.' *Id.* at 264–65. An advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review. An advisory guideline system also continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). *See* 28 U.S.C. §§ 994(f), 991(b)(1). The Supreme Court reinforced this view in *Rita v. United States*, 551 U.S. 338 (2007), which held that a court of appeals may apply a presumption

of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In *Rita*, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

> [T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) . . . . The provision also tells the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.

Id. at 347–48 (emphasis in original). The Court concluded that '[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale[,]' *id.* at 348, and that the Commission's process for promulgating guidelines results in 'a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.' *Id.* at 350.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). *See Rita*, 551 U.S. at 351. The appellate court engages in a two-step process upon review. The appellate court 'first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' *Gall*, 552 U.S. at 51.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in *Rita*:

> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 551 U.S. at 350; *see also Booker*, 543 U.S. at 264 ('[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.'); *Gall*, 552 U.S. at 46 ('[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.').

Provisions of the Sentencing Reform Act promote and facilitate this evolutionary process. For example, pursuant to 28 U.S.C. § 994(x), the Commission publishes guideline amendment proposals in the *Federal Register* and conducts hearings to solicit input on those proposals from experts and other members of the public. Pursuant to 28 U.S.C. § 994(o), the Commission periodically reviews and revises the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources. Statutory mechanisms such as these bolster the Commission's ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) in its promulgation of the guidelines.

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in *Kimbrough v. United States*, 552 U.S. 85 (2007), 'Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum.' *Id.* at 103; 28 U.S.C. § 994(h).

As envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act. As such, the guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.

3. AUTHORITY

§1A3.1. *Authority*

> The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.";

and inserting the following:

“ PART A — INTRODUCTION AND AUTHORITY

Introductory Commentary

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Congress directed the Commission to establish sentencing policies and practices for the federal criminal justice system and develop guidelines that further the purposes of sentencing. This part provides the statutory authority and mission of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code, and are set forth in this Guidelines Manual.

The Guidelines Manual is structured to reflect the advisory sentencing scheme established following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), recognizing both essential steps of the court's inquiry in imposing a sentence 'sufficient, but not greater than necessary.' *See* 18 U.S.C. § 3553(a). The guidelines and policy statements set forth throughout the Guidelines Manual represent the first step in the sentencing process and are one of multiple factors judges must consider under 18 U.S.C. § 3553(a).

Originally, consistent with the pre-*Booker* sentencing system, the Guidelines Manual included an additional step for determining a sentence by providing for a number of 'departures,' which were provisions that allowed the court to impose a sentence outside the applicable guideline range or otherwise different from the guideline sentence before the court's consideration of the additional sentencing factors set forth in 18 U.S.C. § 3553(a). The departure provisions were set forth throughout the Guidelines Manual as part of the commentary to numerous guidelines and in policy statements contained in Chapter Four, Part A, and Chapter Five, Parts H and K.

Following *Booker*, courts are permitted to impose sentences outside the applicable guideline range as 'variances,' both for reasons related to the operation of the applicable guideline provisions and in light of individual characteristics unrelated to guideline provisions. In the years after *Booker*, courts used departures with much less frequency in favor of variances.

In 2025, the Commission amended the Guidelines Manual to remove departures and policy statements relating to specific personal characteristics. (*See* USSG App. C, amendment 836). The Commission sought to make these changes to better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the Guidelines Manual in the wake of *Booker* and subsequent decisions. The Commission envisioned and framed this 2025 amendment to be outcome neutral, intending that judges who would have relied upon facts previously identified as a basis for a departure would continue to have the authority to rely upon such facts to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a). The removal of departures from the Guidelines Manual does not limit the information courts may consider in imposing a sentence nor does it reflect a view from the Commission that such facts should no longer inform a court for purposes of determining the appropriate sentence. In this regard, Appendix B of the Guidelines Manual compiles the departure provisions as they were last provided in the 2024 edition of the Manual. Similarly, information describing the historical development and evolution of the federal sentencing guidelines is also set forth in Appendix B of the Guidelines Manual.

1. AUTHORITY

§1A1.1. *Commission's Authority*

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides that a sentencing court 'shall impose a sentence sufficient, but not greater than necessary, to comply with' the purposes of sentencing: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) deterrence; (3) protection of the public from further crimes; and (4) rehabilitation. *See* 18 U.S.C. § 3553(a). The Act also provides for the development of guidelines by the Commission that further those purposes.

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

The Commission has ensured that the guidelines, policy statements, and commentary used to calculate the guideline range are: (1) neutral as to the race, sex, national origin, creed, and socioeconomic status of the defendant; and (2) generally do not reflect consideration of education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant, in recommending a term of imprisonment or length of imprisonment. *See* 28 U.S.C. § 994(d), (e).

Commentary

Background: The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the 'Act') provides that courts must consider a variety of factors when imposing a sentence 'sufficient, but not greater than necessary' to comply with the purposes of sentencing as set forth in the Act—to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, deterrence, protection of the public from further crimes, and rehabilitation. 18 U.S.C. § 3553(a). The Act provides for the development of guidelines that will (1) further these statutory purposes of sentencing; (2) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (3) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. § 994(f).

As background, Congress provided specific directives to the Commission when setting a guideline range for 'each category of offense involving each category of defendant.' 28 U.S.C. § 994(b)(1).

First, the Act directs the Commission to consider, for purposes of establishing categories of offenses, whether the following seven matters, 'among others,' have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence: (1) the grade of the offense; (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach

of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the Nation as a whole. *See* 28 U.S.C. § 994(c).

Second, the Act directs the Commission to consider, for purposes of establishing categories of defendants, whether the following eleven matters, 'among others,' have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. *See* 28 U.S.C. § 994(d). The Act also directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics—race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. § 994(d).

Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the 'general inappropriateness' of considering five of those characteristics—education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. § 994(e).

In formulating the guidelines used to calculate the guideline range, the Commission remains cognizant of these detailed instructions directing the Commission to consider whether, and to what extent, specific offense-based and offender-based factors are relevant to sentencing. *See* 28 U.S.C. § 994(c), (d). Similarly, the Commission has ensured that the guidelines, policy statements, and commentary used to calculate the guideline range are: (1) neutral as to the race, sex, national origin, creed, and socioeconomic status of the defendant; and (2) generally do not reflect consideration of education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or length of imprisonment. *See* 28 U.S.C. § 994(d), (e).

The requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, however, do not apply to the sentencing court. To the contrary, Congress set forth the factors that a court must consider in imposing a sentence that is 'sufficient but not greater than necessary' to comply with the purposes of sentencing in 18 U.S.C. § 3553(a). These statutory factors permit a sentencing court to consider the 'widest possible breadth of information' about a defendant ensuring the court is in 'possession of the fullest information possible concerning the defendant's life and characteristics.' *See Pepper v. United States*, 562 U.S. 476, 488 (2011); *see also Concepcion v. United States,* 597 U.S. 481, 493 (2022). Accordingly, the application instructions set forth in the following part are structured to reflect this two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the 'starting point and initial benchmark' and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–51 (2007).".

Section 1B1.1(a) is amended—

by inserting at the beginning the following new heading: "*Step One: Calculation of Guideline Range and Determination of Sentencing Requirements and Options under the Guidelines Manual*.—";

in paragraph 5 by striking "Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three" and inserting "Apply the adjustment for the defendant's acceptance of responsibility and the reduction pursuant to an early disposition program, as appropriate, from Parts E and F of Chapter Three";

and by inserting at the end the following new paragraph (9):

"(9) Apply, as appropriate, Part K of Chapter Five.".

Section 1B1.1 is amended by striking subsections (b) and (c) as follows:

"(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).";

and inserting the following new subsection (b):

"(b) *Step Two: Consideration of Factors Set Forth in 18 U.S.C. § 3553(a).*—After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1—

by striking subparagraph (F) as follows:

"(F) 'Departure' means (i) for purposes other than those specified in clause (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. 'Depart' means grant a departure.

'Downward departure' means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. 'Depart downward' means grant a downward departure.

'Upward departure' means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. 'Depart upward' means grant an upward departure.";

and by redesignating subparagraphs (G) through (M) as subparagraphs (F) through (L), respectively.

The Commentary to §1B1.1 captioned "Background" is amended by striking the following:

"The court must impose a sentence 'sufficient, but not greater than necessary,' to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a 'variance'. *See Irizarry v. United States*, 553 U.S. 708, 709–16 (2008) (describing within-range sentences and departures as 'sentences imposed under the framework set out in the Guidelines').";

and inserting the following:

"The court must impose a sentence 'sufficient, but not greater than necessary,' to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). This guideline is structured to reflect the advisory sentencing scheme established following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), by setting forth both essential steps of the court's inquiry in making this determination.

Originally, the guidelines were mandatory, with limited exceptions. *See* 18 U.S.C. § 3553(b). Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker,* district courts are first required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that 'the post-*Booker* federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing'). Step one sets forth the steps for properly calculating the guidelines.

District courts are then required to fully and carefully consider the additional factors set forth in 18 U.S.C. § 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2); (3) the kinds of sentence available; (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (5) the need to provide restitution to any victims of the offense. *See Rita*, 551 U.S. at 351. Step two, as set forth in subsection (b), reflects this step of the sentencing process.".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 by striking "the court would be forced to use an artificial guideline and then depart from it" and inserting "the court would be forced to use an artificial guideline and then impose a sentence that is greater than the otherwise applicable guideline range"; and by striking "the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure" and inserting "the probation officer might need to calculate the robbery guideline to assist the court in determining an appropriate sentence".

Section 1B1.3(b) is amended in the heading by striking "*Five (Determining the Sentence)*" and inserting "*Five (Determining the Sentencing Range and Options Under the Guidelines)*".

The Commentary to §1B1.3 captioned "Application Notes" is amended—

in Note 3(B) by striking "The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.";

and in Note 6(B) by striking "In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. *See generally* §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure).".

Section 1B1.4 is amended—

in the heading by striking "*(Selecting a Point Within the Guideline Range or Departing from the Guidelines)*";

and by striking "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted" and inserting "In determining the sentence to impose".

The Commentary to 1B1.4 captioned "Background" is amended by striking the following:

"This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).";

and inserting the following:

"This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970

statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines may provide a reason for sentencing at the top of, or above, the guideline range.".

Section 1B1.7 is amended by striking the following:

"The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.";

and inserting the following:

"The Commentary that accompanies the guideline sections may serve a number of purposes. It may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. In addition, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline.".

Section 1B1.8(b)(5) is amended by striking "in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities)" and inserting "in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities)".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 1 by striking "Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); *e.g.*, a court may refuse to depart downward on the basis of such information." and inserting "In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities). For example, a court may refuse to impose a sentence that is below the otherwise applicable guideline range on the basis of such information.".

The Commentary to §1B1.9 captioned "Application Notes" is amended in Note 2 by adding at the end of the paragraph the following: "For example, in a case where the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716 while committing an offense covered by the guidelines, it would be appropriate

for the court to consider this fact as an aggravating factor in determining the appropriate sentence even though section 716 is a Class B misdemeanor not covered by the guidelines. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, § 1191(c).".

The Commentary to §1B1.10 captioned "Application Notes," as amended by Amendment 835, is further amended—

in Note 1(A) by striking "(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance)" and inserting "(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a)(1)–(7), which is determined before consideration of Part K of Chapter Five and §1B1.1(b))";

and in Note 3 by striking "(constituting a downward departure or variance)" and inserting "(constituting a sentence that is below the otherwise applicable guideline range)"; by striking "(representing a downward departure of 20 percent" and inserting "(representing a reduction of 20 percent"; and by striking "(authorizing, upon government motion, a downward departure based on the defendant's substantial assistance)" and inserting "(authorizing the court, upon government motion, to impose a sentence that is below the otherwise applicable guideline range based on the defendant's substantial assistance)".

Section 1B1.12 is amended by striking "sufficient to warrant an upward departure from that guideline range. *United States v. R.L.C.*, 503 U.S. 291 (1992)" and inserting "sufficient to warrant imposing a sentence greater than that guideline range in determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 5037(c); *United States v. R.L.C.*, 503 U.S. 291 (1992)".

Chapter Two is amended in the Introductory Commentary by striking "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders); and Chapter Five, Part K (Departures)" and inserting: "and Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

The Commentary to §2A1.1 captioned "Application Notes" is amended in Note 2 by striking the following:

"*Imposition of Life Sentence*.—

(A) *Offenses Involving Premeditated Killing*.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

(B) *Felony Murder*.—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (*e.g.*, recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense

conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.";

and inserting the following:

"*Offenses Involving Premeditated Killing*.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. If a mandatory statutory term of life imprisonment applies, a lesser term of imprisonment is permissible only in cases in which the government files a motion pertaining to the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).".

The Commentary to §2A1.2 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. *Upward Departure Provision*.—If the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. *See* §5K2.8 (Extreme Conduct).".

The Commentary to §2A2.1 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. *Upward Departure Provision*.—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.".

The Commentary to §2A2.4 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. *Upward Departure Provision*.—The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. *See* §5K2.7 (Disruption of Governmental Function).".

The Commentary to §2A3.1 captioned "Application Notes" is amended by striking Note 6 as follows:

"6. *Upward Departure Provision*.—If a victim was sexually abused by more than one participant, an upward departure may be warranted. *See* §5K2.8 (Extreme Conduct).".

The Commentary to §2A3.2 captioned "Application Notes" is amended by striking Note 6 as follows:

"6. *Upward Departure Consideration*.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward de-

parture may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.".

The Commentary to §2A3.6 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Upward Departure*.—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.".

The Commentary to §2A5.3 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted.".

The Commentary to §2A6.1 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Departure Provisions*.—

(A) *In General*.—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. *See* Chapter Five, Part K (Departures).

(B) *Multiple Threats, False Liens or Encumbrances, or Victims; Pecuniary Harm*.—If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted.".

The Commentary to §2A6.2 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.".

The Commentary to §2B1.1 captioned "Application Notes" is amended—

in Note 8(A) by striking "If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.";

and by striking Note 21 as follows:

"21. *Departure Considerations*.—

(A) *Upward Departure Considerations*.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.

(v) In a case involving stolen information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(B) *Upward Departure for Debilitating Impact on a Critical Infrastructure*.—An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

(C) *Downward Departure Consideration*.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

(D) *Downward Departure for Major Disaster or Emergency Victims*.—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.".

The Commentary to §2B1.5 captioned "Application Notes" is amended by striking Note 9 as follows:

"9. *Upward Departure Provision*.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources or paleontological resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) or paleontological resources; or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (*e.g.*, the Statue of Liberty or the Liberty Bell).".

The Commentary to §2B2.1 captioned "Background" is amended by striking "Weapon use would be a ground for upward departure.".

The Commentary to §2B3.1 captioned "Application Notes," as amended by Amendment 832, is further amended—

by striking Note 5 as follows:

"5. *Upward Departure Provision*.—If the defendant intended to murder the victim, an upward departure may be warranted; *see* §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).";

and by redesignating Note 6 as Note 5.

The Commentary to §2B3.2 captioned "Application Notes," as amended by Amendment 832, is further amended by striking Notes 7 and 8 as follows:

"7. *Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims*.—If the offense involved the threat of death or serious bodily injury to numerous victims (*e.g.*, in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.

8. *Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim*.—If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.".

The Commentary to §2B5.3 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. *Departure Considerations*.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.".

The Commentary to §2C1.1 captioned "Application Notes" is amended—

in Note 5 by striking "Chapter Three, Parts A–D" and inserting "Chapter Three, Parts A–E";

and by striking Note 7 as follows:

"7. *Upward Departure Provisions*.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in §2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the

offense is still not adequately reflected, an upward departure is warranted. *See* Chapter Five, Part K (Departures).

In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* §5K2.7 (Disruption of Governmental Function).".

The Commentary to §2C1.8 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Departure Provision*.—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

in Note 3 by striking the following paragraph:

"An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.";

in Note 10 by striking the following paragraph:

"In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.";

in Note 18(A) by striking "In some cases, the enhancement under subsection (b)(14)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining" and inserting "In determining";

in Note 22 by striking the following:

"*Application of Subsection (e)(1)*.—

(A) *Definition*.—For purposes of this guideline, 'sexual offense' means a 'sexual act' or 'sexual contact' as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.

(B) *Upward Departure Provision*.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.",

and inserting the following:

"*Application of Subsection (e)(1)*.—For purposes of this guideline, 'sexual offense' means a 'sexual act' or 'sexual contact' as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.";

in Note 24 by striking "a lower sentence imposed (including a downward departure)" and inserting "a lower sentence imposed";

and by striking Note 27 as follows:

"27. *Departure Considerations*.—

(A) *Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations*.—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

(B) *Upward Departure Based on Drug Quantity*.—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

(C) *Upward Departure Based on Unusually High Purity*.—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

(D) *Departure Based on Potency of Synthetic Cathinones*.—In addition to providing converted drug weights for specific controlled substances and groups of substances, the Drug Conversion Tables provide converted drug weights for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which

a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) *Departures for Certain Cases involving Synthetic Cannabinoids*.—

(i) *Departure Based on Concentration of Synthetic Cannabinoids*.—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

(ii) *Downward Departure Based on Potency of Synthetic Cannabinoids*.—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.".

The Commentary to §2D1.5 captioned "Application Notes" is amended—

by striking Note 2 as follows:

"2. *Upward Departure Provision*.—If as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large, an upward departure may be warranted.";

and by redesignating Notes 3 and 4 as Notes 2 and 3, respectively.

The Commentary to §2D1.7 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (*e.g.*, transportation for the defendant's personal use), a downward departure may be warranted.".

The Commentary to §2D1.11 captioned "Application Notes" is amended—

in Note 1 by striking subparagraph (C) as follows:

"(C) *Upward Departure*.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.";

and in Note 4 by striking "In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs" and inserting "Any costs".

The Commentary to §2D1.12 captioned "Application Notes" is amended—

by striking Note 1 as follows:

"1. If the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material, an upward departure may be warranted.";

by redesignating Notes 2, 3, and 4 as Notes 1, 2, and 3, respectively;

and in Note 2 (as so redesignated) by striking "In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs" and inserting "Any costs".

The Commentary to §2D2.1 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.".

The Commentary to §2D2.3 captioned "Background" is amended by striking "If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.".

The Commentary to §2E1.1 captioned "Application Notes" is amended in Note 4 by striking "If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.".

The Commentary to §2E3.1 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. *Upward Departure Provision*.—The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).".

The Commentary to §2G1.1 captioned "Application Notes" is amended—

in Note 2 by striking "If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by striking Note 6 as follows:

"6. *Upward Departure Provision*.—If the offense involved more than ten victims, an upward departure may be warranted.".

The Commentary to §2G1.3 captioned "Application Notes" is amended by striking Note 7 as follows:

"7. *Upward Departure Provision*.—If the offense involved more than ten minors, an upward departure may be warranted.".

The Commentary to §2G2.1 captioned "Application Notes" is amended by striking Note 8 as follows:

"8. *Upward Departure Provision*.—An upward departure may be warranted if the offense involved more than 10 minors.".

The Commentary to §2G2.2 captioned "Application Notes" is amended—

in Note 6(B)(i) by striking "If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.";

in Note 6(B)(ii) by striking "If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.";

and by striking Note 9 as follows:

"9. *Upward Departure Provision*.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.".

The Commentary to §2H2.1 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. *Upward Departure Provision*.—If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2H3.1 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. *Upward Departure*.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.

(B) The offense caused or risked substantial non-monetary harm (*e.g.*, physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.".

The Commentary to §2H4.1 captioned "Application Notes" is amended by striking Notes 3 and 4 as follows:

"3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.

4. In a case in which the defendant was convicted under 18 U.S.C. §§ 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (*i.e.*, in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.".

The Commentary to §2J1.2 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. *Upward Departure Considerations*.—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face) or a particularly serious sex offense, an upward departure would be warranted.";

and by redesignating Note 5 as Note 4.

The Commentary to §2J1.3 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by redesignating Note 5 as Note 4.

The Commentary to §2J1.6 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (*e.g.*, perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice) is made because of the operation of the rules set out in Application Note 3.";

and by redesignating Note 5 as Note 4.

The Commentary to §2K1.3 captioned "Application Notes" is amended—

by striking Note 10 as follows:

"10. An upward departure may be warranted in any of the following circumstances: (A) the quantity of explosive materials significantly exceeded 1000 pounds; (B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (*e.g.*, plastic explosives); (C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals.";

by redesignating Note 11 as Note 10;

and in Note 10 (as so redesignated) by striking "However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.".

The Commentary to §2K1.4 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. *Upward Departure Provision*.—If bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

Section 2K2.1(b)(10)(B), as redesignated by Amendment 834, is amended by striking ", before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)".

The Commentary to §2K2.1 captioned "Application Notes," as amended by Amendment 834, is further amended—

in Note 7 by striking the following:

"Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For

example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. *See also* §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).";

by striking Note 11 as follows:

"11. *Upward Departure Provisions*.—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable ('plastic') firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).";

by redesignating Notes 12, 13, and 14 as Notes 11, 12, and 13, respectively;

in Note 12 (as so redesignated)—

by striking subparagraph (B) as follows:

"(B) *Upward Departure Provision*.—If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.";

and by redesignating subparagraph (C) as subparagraph (B);

and in Note 13 (as so redesignated)—

by striking subparagraph (D) as follows:

"(D) *Upward Departure Provision*.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.";

and by redesignating subparagraph (E) as subparagraph (D).

Section 2K2.4(a) is amended by striking "Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood)" and inserting "Chapters Three (Adjustments), Parts A through E, and Four (Criminal History and Criminal Livelihood)".

Section 2K2.4(b) is amended by striking "Chapters Three and Four" and inserting "Chapters Three, Parts A through E, and Four".

Section 2K2.4(c) is amended by striking "Chapters Three and Four" and inserting "Chapters Three, Parts A through E, and Four".

The Commentary to §2K2.4 captioned "Application Notes," as amended by Amendment 834, is further amended—

in Note 2 by striking the following:

"*Application of Subsection (b).*—

(A) *In General*.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.*, not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) *Upward Departure Provision*.—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.";

and inserting the following:

"*Application of Subsection (b).*—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.*, not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.";

in Note 4 by striking the subparagraph (C) as follows:

"(C) *Upward Departure Provision***.**—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).";

and in Note 5 by striking "Chapter Three (Adjustment) and Chapter Four (Criminal History and Criminal Livelihood)" and inserting "Chapter Three (Adjustment), Parts A through E, and Chapter Four (Criminal History and Criminal Livelihood)"; and by striking "no other adjustments in Chapter Three" and inserting "no other adjustments in Chapter Three, Parts A through D,".

The Commentary to §2K2.5 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. Where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply, an upward departure may be warranted.".

The Commentary to §2L1.1 captioned "Application Notes" is amended—

in Note 4 by striking "Application Note 1(M) of §1B1.1" and inserting "Application Note 1(L) of §1B1.1";

and by striking Note 7 as follows:

"7. *Upward Departure Provisions*.—An upward departure may be warranted in any of the following cases:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.".

The Commentary to §2L1.2 captioned "Application Notes" is amended by striking Notes 6, 7, and 8 as follows:

"6. *Departure Based on Seriousness of a Prior Offense*.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (*see* §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

7. *Departure Based on Time Served in State Custody*.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). *See* §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other

things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

8. *Departure Based on Cultural Assimilation*.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.".

The Commentary to §2L2.1 captioned "Application Notes" is amended—

by striking Note 3 as follows:

"3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.";

by redesignating Note 4 as Note 3;

and by striking Note 5 as follows:

"5. If the offense involved substantially more than 100 documents, an upward departure may be warranted.".

The Commentary to §2L2.2 captioned "Application Notes" is amended by striking Note 6 as follows:

"6. *Upward Departure Provision*.—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. *See* Application Note 4 of the Commentary to §3A1.4 (Terrorism).".

The Commentary to §2M3.1 captioned "Application Notes" is amended—

in Note 2 by striking "When revelation is likely to cause little or no harm, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by striking Note 3 as follows:

"3. The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy.".

The Commentary to §2M4.1 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.".

The Commentary to §2M5.1 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. *Departure Provisions*.—

(A) *In General*.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict*.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.".

The Commentary to §2M5.2 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

in Note 1 by striking the following:

"The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by striking Note 2 as follows:

"2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest

of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.".

The Commentary to §2M5.3 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. *Departure Provisions*.—

(A) *In General*.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict*.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.".

The Commentary to §2N1.1 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

by striking Note 1 as follows:

"1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.";

and by redesignating Note 2 as Note 1.

The Commentary to §2N1.2 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2N1.3 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2N2.1 captioned "Application Notes" is amended—

by striking Note 1 as follows:

"1. This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).";

by redesignating Note 2 as Note 1;

by striking Note 3 as follows:

"3. *Upward Departure Provisions*.—The following are circumstances in which an upward departure may be warranted:

(A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. *See* Chapter Five, Part K (Departures).

(B) The defendant was convicted under 7 U.S.C. § 7734.";

and by redesignating Note 4 as Note 2.

The Commentary to §2P1.1 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by redesignating Notes 5 and 6 as Notes 4 and 5, respectively.

The Commentary to §2P1.3 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2Q1.1 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or serious bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2Q1.2 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.";

by redesignating Notes 5 through 8 as Notes 4 through 7, respectively;

in Note 4 (as so redesignated) by striking "Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.";

in Note 5 (as so redesignated) by striking "Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).";

in Note 6 (as so redesignated) by striking "Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.";

in Note 7 (as so redesignated) by striking "Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.";

and by striking Note 9 as follows:

"9. *Other Upward Departure Provisions*.—

(A) *Civil Adjudications and Failure to Comply with Administrative Order*.—In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

(B) *Extreme Psychological Injury*.—If the offense caused extreme psychological injury, an upward departure may be warranted. *See* §5K2.3 (Extreme Psychological Injury).

(C) *Terrorism*.—If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of the Commentary to §3A1.4 (Terrorism).".

The Commentary to §2Q1.3 captioned "Application Notes" is amended—

by striking Note 3 as follows:

"3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.";

by redesignating Notes 4 through 7 as Notes 3 through 6, respectively;

in Note 3 (as so redesignated) by striking "Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.";

in Note 4 (as so redesignated) by striking "Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).";

in Note 5 (as so redesignated) by striking "Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.";

in Note 6 (as so redesignated) by striking "Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.";

and by striking Note 8 as follows:

"8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).".

The Commentary to §2Q1.4 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. *Departure Provisions*.—

(A) *Downward Departure Provision*.—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) *Upward Departure Provisions*.—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of §3A1.4 (Terrorism).".

The Commentary to §2Q2.1 captioned "Application Notes" is amended—

by striking Note 5 as follows:

"5. If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.";

and by redesignating Note 6 as Note 5.

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by striking "a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))" and inserting "a sentence at the maximum of the applicable guideline range may be warranted".

The Commentary to §2T1.8 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If the defendant was attempting to evade, rather than merely delay, payment of taxes, an upward departure may be warranted.".

The Commentary to §2T2.1 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. Offense conduct directed at more than tax evasion (*e.g.*, theft or fraud) may warrant an upward departure.".

Chapter Two, Part T, Subpart 3 is amended in the Introductory Commentary by striking ", or for departing upward if there is not another more specific applicable guideline".

The Commentary to §2T3.1 captioned "Application Notes" is amended—

by striking Note 2 as follows:

"2. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, an upward departure may be warranted. A sentence based upon an alternative measure of the 'duty' evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered.";

and by redesignating Note 3 as Note 2.

The Commentary to §2X5.1 captioned "Application Notes" is amended—

in Note 1 by inserting after "include:" the following: "§3F1.1 (Early Disposition Programs (Policy Statement));"; by striking "Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six,

Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements)" and inserting "Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Assistance to Authorities); Chapter Six, Part A (Sentencing Procedures); and Chapter Six, Part B (Plea Agreements)";

and in Note 2 by striking the following:

"*Convictions under 18 U.S.C. § 1841(a)(1).*—

(A) *In General*.—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(B) *Upward Departure Provision*.—For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.";

and inserting the following:

"*Convictions under 18 U.S.C. § 1841(a)(1).*—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).".

The Commentary to §2X7.2 captioned "Application Note" is amended in Note 1 by striking the following:

"*Upward Departure Provisions*.—An upward departure may be warranted in any of the following cases:

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.";

and inserting the following:

"As identified by Congress in section 103 of Public Law 110–407, the following factors may also warrant consideration in imposing a sentence under this guideline:

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.".

The Commentary to §3A1.1 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.";

and by redesignating Note 5 as Note 4.

The Commentary to §3A1.2 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. *Upward Departure Provision*.—If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.".

The Commentary to §3A1.3 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. If the restraint was sufficiently egregious, an upward departure may be warranted. *See* §5K2.4 (Abduction or Unlawful Restraint).".

The Commentary to §3A1.4 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Upward Departure Provision*.—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.".

The Commentary to §3B1.1 captioned "Application Notes" is amended in Note 2 by striking "An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.".

The Commentary to §3B1.4 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.".

The Commentary to §3C1.2 captioned "Application Notes" is amended—

in Note 2 by striking "However, where a higher degree of culpability was involved, an upward departure above the 2-level increase provided in this section may be warranted.";

and by striking Note 6 as follows:

"6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §3D1.1 captioned "Background" is amended by striking "Chapter Three, Part E (Acceptance of Responsibility)" and inserting "Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Programs),"; and by striking "Chapter Five (Determining the Sentence)" both places such phrase appears and inserting "Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)".

The Commentary to §3D1.2 captioned "Background" is amended by striking "it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior" and inserting "it was rejected because, in many cases, it would not adequately capture the scope and impact of the criminal behavior".

The Commentary to §3D1.3 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* §5K2.5 (Property Damage or Loss).".

The Commentary to §3D1.4 captioned "Background" is amended by striking the following:

"When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.";

and inserting the following:

"When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17.".

The Commentary to §3D1.5 is amended by striking "Chapter Five (Determining the Sentence)" and inserting "Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)"; and by striking "Chapter Three, Part E (Acceptance of Responsibility)" and inserting "Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Programs),".

Chapter Three is amended by inserting at the end the following new Part F:

" PART F — EARLY DISPOSITION PROGRAMS

§3F1.1. *Early Disposition Programs (Policy Statement)*

Upon motion of the Government, the court may decrease the defendant's offense level pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The level of the decrease shall be consistent with the authorized program within the filing district and the government motion filed, but shall be not more than 4 levels.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21).".

Chapter Four, Part A is amended in the Introductory Commentary by striking "and §4A1.3".

The Commentary to §4A1.1 captioned "Background" is amended by striking "In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.".

Section 4A1.2(h) is amended by striking ", but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))".

Section 4A1.2(i) is amended by striking ", but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))".

Section 4A1.2(j) is amended by striking ", but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))".

The Commentary to §4A1.2 captioned "Applications Notes" is amended—

in Note 3 by striking the following:

"*Application of 'Single Sentence' Rule (Subsection (a)(2)).*—

(A) *Predicate Offenses.*—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted 'separately' from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) *Upward Departure Provision.*—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single

set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.";

and inserting the following:

"*Application of 'Single Sentence' Rule (Subsection (a)(2)).*—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted 'separately' from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.";

in Note 6 by striking the following paragraph:

"Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).";

and in Note 8 by striking "If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).".

Chapter Four, Part A is amended by striking §4A1.3 and its accompanying commentary in its entirety as follows:

"§4A1.3. *Departures Based on Inadequacy of Criminal History Category (Policy Statement)*

(a) *Upward Departures.*—

(1) *Standard for Upward Departure.*—If reliable information indicates that the defendant's criminal history category substantially under-rep-

resents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) *Types of Information Forming the Basis for Upward Departure.*—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) *Prohibition.*—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) *Determination of Extent of Upward Departure.*—

(A) *In General.*—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) *Upward Departures from Category VI.*—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) *Downward Departures.*—

(1) *Standard for Downward Departure.*—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) *Prohibitions.*—

(A) *Criminal History Category I.*—Unless otherwise specified, a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) *Armed Career Criminal and Repeat and Dangerous Sex Offender.*—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) *Limitations.*—

(A) *Limitation on Extent of Downward Departure for Career Offender.*—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) *Limitation on Applicability of §5C1.2 in Event of Downward Departure.*—A defendant who receives a downward departure under this subsection does not meet the criminal history requirement of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if the defendant did not otherwise meet such requirement before receipt of the downward departure.

(c) *Written Specification of Basis for Departure.*—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

Commentary

Application Notes:

1. *Definitions.*—For purposes of this policy statement, the terms 'depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. *Upward Departures.*—

(A) *Examples.*—An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) A previous foreign sentence for a serious offense.

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) *Upward Departures from Criminal History Category VI.*—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) *Upward Departures Based on Tribal Court Convictions.*—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. *Downward Departures.*—

(A) *Examples.*—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.".

The Commentary to §4B1.1 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Departure Provision for State Misdemeanors.*—In a case in which one or both of the defendant's 'two prior felony convictions' is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).".

The Commentary to §4B1.2 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Upward Departure for Burglary Involving Violence.*—There may be cases in which a burglary involves violence, but does not qualify as a 'crime of violence' as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a 'crime of violence.' In such a case, an upward departure may be appropriate.".

The Commentary to §4B1.4 captioned "Application Notes" is amended in Note 2 by striking the following paragraph:

"In a few cases, the rule provided in the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if subsections (b)(3)(A) and (c)(2) had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).".

The Commentary to §4B1.4 captioned "Background" is amended by striking "In some cases, the criminal history category may not adequately reflect the defendant's criminal history; *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).".

The Commentary to §4C1.1 captioned "Application Notes" is amended—

in the heading by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. *Upward Departure.*—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.".

Chapter Five is amended—

in the heading by striking "Determining the Sentence" and inserting "Determining the Sentencing Range and Options Under the Guidelines";

and in the Introductory Commentary by striking the following:

" For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).";

and inserting the following:

" Chapter Five sets forth the steps used to determine the applicable sentencing range based upon the guideline calculations made in Chapters Two through Four. Additionally, the provisions in this chapter set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range. For example, for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. After applying the provisions of this chapter to determine the sentencing options recommended under the guidelines pursuant to subsection (a) of §1B1.1 (Application Instructions), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to

determine the length and type of sentence that is sufficient but not greater than necessary. A sentence is within the guidelines if it complies with each applicable section of this chapter.".

The Commentary to §5B1.1 captioned "Applications Notes" is amended by inserting at the end the following new Note 3:

"3. *Factors to Be Considered*.—

(A) *Statutory Factors*.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, is required by statute to consider the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable. *See* 18 USC § 3562(a).

(B) *Substance Abuse*.—In a case in which a defendant sentenced to probation is an abuser of controlled substances or alcohol, it is recommended that the court consider imposing a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse may be appropriate. *See* §5B1.3(d)(4).

(C) *Domestic Violence*.—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of probation is required by statute if the defendant is not sentenced to a term of imprisonment. *See* 18 U.S.C. § 3561(b). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3563(a); §5B1.3(a)(4).

(D) *Mental and Emotional Conditions*.—In a case in which a defendant sentenced to probation is in need of psychological or psychiatric treatment, it is recommended that the court consider imposing a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* §5B1.3(d)(5).

(E) *Education and Vocational Skills*.—Education and vocational skills may be relevant in determining the conditions of probation for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

(F) *Employment Record*.—A defendant's employment record may be relevant in determining the conditions of probation *(e.g.*, the appropriate hours of home detention).".

The Commentary to §5C1.1 captioned "Application Notes" is amended—

by striking Note 6 as follows:

"6. *Departures Based on Specific Treatment Purpose.*—There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled

substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.";

by redesignating Notes 7 through 10 as Notes 6 through 9, respectively;

and in Note 9 (as so redesignated) by striking the following:

"*Zero-Point Offenders.*—

(A) *Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).

(B) *Departure for Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.*—A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).";

and inserting the following:

"*Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).".

The Commentary to §5D1.1 captioned "Application Notes," as amended by Amendment 835, is further amended—

in Note 3, as redesignated by Amendment 835, by striking "*See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)" and inserting "*See* §5D1.3(b)(3)(D)";

by further redesignating Notes 5, 6, and 7 (as redesignated by Amendment 835) as Notes 8, 9, and 10, respectively;

and by inserting after Note 4, as redesignated by Amendment 835, the following new Notes 5, 6, and 7:

"5. *Mental and Emotional Conditions*.—In a case in which a defendant sentenced to imprisonment is in need of psychological or psychiatric treatment, it is recommended that the court consider imposing a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* §5D1.3(b)(3)(E).

6. *Education and Vocational Skills*.—Education and vocational skills may be relevant in determining the conditions of supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

7. *Employment Record*.—A defendant's employment record may be relevant in determining the conditions of supervised release *(e.g.*, the appropriate hours of home detention).".

Section 5D1.3(b)(3)(D), as redesignated and amended by Amendment 835, is further amended by inserting after "possess alcohol." the following: "If participation in a substance abuse program is required, the length of the term of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.".

The Commentary to §5E1.2 captioned "Applications Notes" is amended—

by striking Note 4 as follows:

"4. The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (*e.g.*, by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.";

and by redesignating Notes 5, 6, and 7 as Notes 4, 5, and 6, respectively.

The Commentary to §5G1.1 is amended by striking "; a sentence of less than 48 months would be a guideline departure"; and by striking "; a sentence of more than 60 months would be a guideline departure".

The Commentary to §5G1.3 captioned "Application Notes," as amended by Amendment 835, is further amended—

in Note 2(C) by striking "(iii) the undischarged term of imprisonment for which the adjustment is being given" and inserting "(iii) the undischarged term of imprisonment for which the adjustment is being given and the relevant case information (including docket number)";

in Note 4(E) by striking the following:

"*Downward Departure.*—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(d), rather than as a credit for time served.";

and inserting the following:

"*Imposition of Sentence.*—Unlike subsection (b), subsection (d) does not address an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. If the court does account for an undischarged term of imprisonment under subsection (d) in imposing the sentence, the Commission recommends that the court clearly state that the sentence was imposed pursuant to 18 U.S.C. § 3553(a), rather than as a credit for time served, to avoid confusion with the Federal Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances.

The court should note on the Judgment in a Criminal Case Order (i) that the sentence was imposed pursuant to 18 U.S.C. § 3553(a); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given and the relevant case information (including docket number); and (iv) that the sentence imposed is to account for a period of imprisonment that will not be credited by the Federal Bureau of Prisons.";

and in Note 5 by striking the following:

"*Downward Departure Provision.*—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* §5K2.23 (Discharged Terms of Imprisonment).";

and inserting the following:

"*Discharged Term of Imprisonment*.—This guideline does not address an adjustment of the sentence for the instant offense for a period of imprisonment already served on a discharged

term of imprisonment. Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3553(a) to consider a previously completed term of imprisonment in determining an appropriate sentence where subsection (b) above would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense.".

Chapter Five is amended by striking in its entirety Part H, as amended by Amendment 835, as follows:

"

PART H — SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

This part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the 'Act') contains several provisions regarding specific offender characteristics:

> *First*, the Act directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics – race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. § 994(d).
>
> *Second*, the Act directs the Commission to consider whether eleven specific offender characteristics, 'among others', have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. § 994(d).
>
> *Third*, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the 'general inappropriateness' of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. § 994(e).
>
> *Fourth*, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, 'the history and characteristics of the defendant'. *See* 18 U.S.C. § 3553(a)(1).

Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, *see* 28 U.S.C. § 994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). *See* §5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, *see* 28 U.S.C. § 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). *See* §5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. *See*, *e.g.*, §§2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).

The Supreme Court has emphasized that the advisory guideline system should 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.' *See United States v. Booker*, 543 U.S. 220, 264–65 (2005). Although the court must consider 'the history and characteristics of the defendant' among other factors, *see* 18 U.S.C.

§ 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be 'the starting point and the initial benchmark.' *Gall v. United States*, 552 U.S. 38, 49 (2007).

Accordingly, the purpose of this part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help 'secure nationwide consistency,' *see Gall v. United States*, 552 U.S. 38, 49 (2007), 'avoid unwarranted sentencing disparities,' *see* 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), 'provide certainty and fairness,' *see* 28 U.S.C. § 991(b)(1)(B), and 'promote respect for the law,' *see* 18 U.S.C. § 3553(a)(2)(A).

This part allocates specific offender characteristics into three general categories.

In the first category are specific offender characteristics the consideration of which Congress has prohibited (*e.g.*, §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.

In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. *See* 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (*e.g.*, age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.

In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See* 28 U.S.C. § 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or various other aspects of an appropriate sentence (*e.g.*, the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. *See* §5K2.0 (Grounds for Departure).

As with the other provisions in this manual, these policy statements 'are evolutionary in nature'. *See* Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. *See*, *e.g.*, 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a 'clearinghouse and information center' on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the 'forbidden factors' specified in 28 U.S.C. § 994(d) and (B) the 'discouraged factors' specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

§5H1.1. *Age (Policy Statement)*

Age may be relevant in determining whether a departure is warranted.

Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

The age-crime curve, one of the most consistent findings in criminology, demonstrates that criminal behavior tends to decrease with age. Age-appropriate interventions and other protective factors may promote desistance from crime. Accordingly, in an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

§5H1.2. *Education and Vocational Skills (Policy Statement)*

Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See* §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

§5H1.3. *Mental and Emotional Conditions (Policy Statement)*

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. *See also* Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.*, participation in a mental health program (*see* §§5B1.3(d)(5) and 5D1.3(b)(3)(E)).

§5H1.4. *Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)*

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(b)(3)(D)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

§5H1.5. *Employment Record (Policy Statement)*

Employment record is not ordinarily relevant in determining whether a departure is warranted.

Employment record may be relevant in determining the conditions of probation or supervised release (*e.g.*, the appropriate hours of home detention).

§5H1.6. *Family Ties and Responsibilities (Policy Statement)*

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Commentary

Application Note:

1. *Circumstances to Consider.*—

(A) *In General.*—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) *Departures Based on Loss of Caretaking or Financial Support*.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

§5H1.7. *Role in the Offense (Policy Statement)*

A defendant's role in the offense is relevant in determining the applicable guideline range (*see* Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (*see* subsection (d) of §5K2.0 (Grounds for Departures)).

§5H1.8. *Criminal History (Policy Statement)*

A defendant's criminal history is relevant in determining the applicable criminal history category. *See* Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

§5H1.9. *Dependence upon Criminal Activity for a Livelihood (Policy Statement)*

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. *See* Chapter Four, Part B (Career Offenders and Criminal Livelihood).

§5H1.10. *Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)*

These factors are not relevant in the determination of a sentence.

§5H1.11. *Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)*

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

§5H1.12. *Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)*

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.".

Chapter Five, Part K is amended in the heading by striking "DEPARTURES" and inserting "ASSISTANCE TO AUTHORITIES".

Chapter Five, Part K, Subpart 1 is amended by striking the heading as follows:

"1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES".

Section 5K1.1 is amended by striking "the court may depart from the guidelines" and inserting "a sentence that is below the otherwise applicable guideline range may be appropriate".

Chapter Five, Part K is amended by striking Subparts 2 and 3 in their entirety as follows:

"2. OTHER GROUNDS FOR DEPARTURE

§5K2.0. *Grounds for Departure (Policy Statement)*

(a) *Upward Departures in General and Downward Departures in Criminal Cases Other Than Child Crimes and Sexual Offenses*.—

(1) *In General*.—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) *Departures Based on Circumstances of a Kind Not Adequately Taken Into Consideration*.—

(A) *Identified Circumstances*.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (*e.g.*, as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.

(B) *Unidentified Circumstances*.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration*.—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) *Departures Based on Not Ordinarily Relevant Offender Characteristics and Other Circumstances*.—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) *Downward Departures in Child Crimes and Sexual Offenses*.—Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) *Limitation on Departures Based on Multiple Circumstances*.—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree; and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) *Prohibited Departures*.—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

(1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the last sentence of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), and the last sentence of 5K2.12 (Coercion and Duress).

(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).

(3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.

(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreement).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(e) *Requirement of Specific Written Reasons for Departure*.—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the statement of reasons form.

Commentary

Application Notes:

1. *Definitions*.—For purposes of this policy statement:

'Circumstance' includes, as appropriate, an offender characteristic or any other offense factor.

'Depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. *Scope of this Policy Statement.*—

(A) *Departures Covered by this Policy Statement.*—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. *See* 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) *Departures Covered by Other Guidelines.*—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (*see* Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (*see* §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (*see* §5K3.1 (Early Disposition Programs)).

3. *Kinds and Expected Frequency of Departures under Subsection (a).*—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) *Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.*—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

(i) *Identified Circumstances.*—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) *Unidentified Circumstances.*—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.*—

(i) *In General.*—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

(ii) *Examples.*—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) *Departures Based on Circumstances Identified as Not Ordinarily Relevant.*—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (*see*, *e.g.*, Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subparagraph shall be stated with specificity in the statement of reasons form.

4. *Downward Departures in Child Crimes and Sexual Offenses.*—

(A) *Definition.*—For purposes of this policy statement, the term 'child crimes and sexual offenses' means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) *Standard for Departure.*—

(i) *Requirement of Affirmative and Specific Identification of Departure Ground.*—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (*i.e.*, Chapter Five, Part K).

(ii) *Application of Subsection (b)(2).*—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. *Departures Based on Plea Agreements.*—Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the statement of reasons form, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, 'it is difficult to prescribe a single set of

guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.' (*See* Chapter One, Part A). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain 'sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.' 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

> '(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
>
> (2) promulgate, pursuant to section 994 of title 28, United States Code—
>
> (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;
>
> (B) a policy statement authorizing a departure pursuant to an early disposition program; and
>
> (C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of . . . section 5K2.0'.

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the 'heartland', that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

§5K2.1. *Death (Policy Statement)*

> If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

§5K2.2. *Physical Injury (Policy Statement)*

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

§5K2.3. *Extreme Psychological Injury (Policy Statement)*

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

§5K2.4. *Abduction or Unlawful Restraint (Policy Statement)*

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

§5K2.5. *Property Damage or Loss (Policy Statement)*

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

§5K2.6. *Weapons and Dangerous Instrumentalities (Policy Statement)*

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

§5K2.7. *Disruption of Governmental Function (Policy Statement)*

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

§5K2.8. *Extreme Conduct (Policy Statement)*

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

§5K2.9. *Criminal Purpose (Policy Statement)*

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

§5K2.10. *Victim's Conduct (Policy Statement)*

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

§5K2.11. *Lesser Harms (Policy Statement)*

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

§5K2.12. *Coercion and Duress (Policy Statement)*

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.

§5K2.13. *Diminished Capacity (Policy Statement)*

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of

violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Commentary

Application Note:

1. For purposes of this policy statement—

'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.

§5K2.14. *Public Welfare (Policy Statement)*

If national security, public health, or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.

§5K2.16. *Voluntary Disclosure of Offense (Policy Statement)*

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

§5K2.17. *Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)*

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'semiautomatic firearm capable of accepting a large capacity magazine' means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application Note:

1. 'Crime of violence' and 'controlled substance offense' are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

§5K2.18. *Violent Street Gangs (Policy Statement)*

If the defendant is subject to an enhanced sentence under 18 U.S.C. § 521 (pertaining to criminal street gangs), an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends. It is to be noted that there may be cases in which 18 U.S.C. § 521 applies, but no violence is established. In such cases, it is expected that the guidelines will account adequately for the conduct and, consequently, this departure provision would not apply.

§5K2.20. *Aberrant Behavior (Policy Statement)*

(a) *In General*.—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) *Requirements*.—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) *Prohibitions Based on the Presence of Certain Circumstances*.—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

Commentary

Application Notes:

1. *Definitions.*—For purposes of this policy statement:

'Dangerous weapon,' 'firearm,' 'otherwise used,' and 'serious bodily injury' have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

'Serious drug trafficking offense' means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that

provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).

2. *Repetitious or Significant, Planned Behavior.*—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.

3. *Other Circumstances to Consider.*—In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

Background: Section 401(b)(3) of Public Law 108–21 directly amended subsection (a) of this policy statement, effective April 30, 2003.

§5K2.21. *Dismissed and Uncharged Conduct (Policy Statement)*

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

§5K2.22. *Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)*

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to depart downward only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

Commentary

Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.

§5K2.23. *Discharged Terms of Imprisonment (Policy Statement)*

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such

departure should be fashioned to achieve a reasonable punishment for the instant offense.

§5K2.24. *Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)*

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716, an upward departure may be warranted.

Commentary

Application Note:

1. *Definition*.—For purposes of this policy statement, 'official insignia or uniform' has the meaning given that term in 18 U.S.C. § 716(c)(3).

3. EARLY DISPOSITION PROGRAMS

§5K3.1. *Early Disposition Programs (Policy Statement)*

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21).".

Chapter Six, Part A is amended by striking §6A1.4 and its accompanying commentary in its entirety as follows:

"§6A1.4. *Notice of Possible Departure (Policy Statement)*

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

Commentary

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in *Burns v. United States*, 501 U.S. 129, 138–39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.".

Chapter Six, Part B is amended in the Introductory Commentary by striking "The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.".

The Commentary to §6B1.2 is amended—

in the paragraph that begins "Similarly, the court" by striking "As set forth in subsection (d) of §5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.";

and in the paragraph that begins "The second paragraph of subsection (a)" by striking "Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.".

The Commentary to §7B1.4 captioned "Application Notes," as amended by Amendment 835, is further amended—

by striking Notes 2, 3, and 4 as follows:

"2. Departure from the applicable range of imprisonment in the Probation Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in probation. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in probation, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, on probation for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.";

and by redesignating Notes 5 and 6 as Notes 2 and 3, respectively.

The Commentary to §7C1.5 captioned "Application Notes," as added by Amendment 835, is amended—

by striking Notes 2, 3, and 4 as follows:

"2. Departure from the applicable range of imprisonment in the Supervised Release Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervised release. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervised release, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, under supervised release for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.";

and by redesignating Notes 5 and 6 as Notes 2 and 3, respectively.

Section 8A1.2(b) is amended—

in paragraph (4) by striking "For grounds for departure from the applicable guideline fine range, refer to Part C, Subpart 4 (Departures from the Guideline Fine Range)" and inserting "Determine whether a sentence below the otherwise applicable guideline range is appropriate upon motion of the government pursuant to §8C4.1 (Substantial Assistance to Authorities — Organizations (Policy Statement))";

and by inserting at the end the following new paragraph (5):

"(5) Consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a).".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 2 by striking "and E (Acceptance of Responsibility)" and inserting "E (Acceptance of Responsibility), and F (Early Disposition Programs)".

The Commentary to §8C2.3 captioned "Application Notes" is amended in Note 2 by striking "and E (Acceptance of Responsibility)" and inserting "E (Acceptance of Responsibility), and F (Early Disposition Programs)".

The Commentary to §8C2.8 captioned "Application Notes" is amended in Note 5 by striking "In a case involving a pattern of illegality, an upward departure may be warranted.".

The Commentary to §8C2.8 captioned "Background" is amended by striking "In unusual cases, factors listed in this section may provide a basis for departure.".

Chapter Eight, Part C, Subpart 4 is amended—

in the heading by striking "DEPARTURES FROM THE GUIDELINE FINE RANGE" and inserting "SUBSTANTIAL ASSISTANCE TO AUTHORITIES";

and by striking the Introductory Commentary as follows:

" *Introductory Commentary*

The statutory provisions governing departures are set forth in 18 U.S.C. § 3553(b). Departure may be warranted if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. In deciding whether departure is warranted, the court should consider the extent to which that factor is adequately taken into consideration by the guidelines and the relative importance or substantiality of that factor in the particular case.

To the extent that any policy statement from Chapter Five, Part K (Departures) is relevant to the organization, a departure from the applicable guideline fine range may be warranted. Some factors listed in Chapter Five, Part K that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Five, Part K may be applicable in particular cases. While this subpart lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive.".

Section 8C4.1(a) is amended by striking "the court may depart from the guidelines" and inserting "a fine that is below the otherwise applicable guideline fine range may be appropriate".

The Commentary to §8C4.1 captioned "Application Note" is amended in Note 1 by striking "Departure under this section" and inserting "Fine reduction under this section".

Chapter Eight, Part C is further amended by striking §§8C4.2 through 8C4.11 in their entirety as follows:

"§8C4.2. *Risk of Death or Bodily Injury (Policy Statement)*

If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.

§8C4.3. *Threat to National Security (Policy Statement)*

If the offense constituted a threat to national security, an upward departure may be warranted.

§8C4.4. *Threat to the Environment (Policy Statement)*

If the offense presented a threat to the environment, an upward departure may be warranted.

§8C4.5. *Threat to a Market (Policy Statement)*

If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted. This section is applicable to both private markets (*e.g.*, a financial market, a commodities market, or a market for consumer goods) and public markets (*e.g.*, government contracting).

§8C4.6. *Official Corruption (Policy Statement)*

If the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official, an upward departure may be warranted.

§8C4.7. *Public Entity (Policy Statement)*

If the organization is a public entity, a downward departure may be warranted.

§8C4.8. *Members or Beneficiaries of the Organization as Victims (Policy Statement)*

If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of an organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

§8C4.9. *Remedial Costs that Greatly Exceed Gain (Policy Statement)*

If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within high-level personnel was involved in the offense, a departure would not be appropriate under this section. The lower the level and the more limited the extent of substantial authority personnel involvement in the offense, and the greater the degree to which remedial costs exceeded or will exceed gain, the less will be the need for a substantial fine to achieve adequate punishment and deterrence.

§8C4.10. *Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)*

If the organization's culpability score is reduced under §8C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.

§8C4.11. *Exceptional Organizational Culpability (Policy Statement)*

If the organization's culpability score is greater than 10, an upward departure may be appropriate.

If no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under §8C2.4(a)(1), §8C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct), a downward departure may be warranted. In a case meeting these criteria, the court may find that the organization had exceptionally low culpability and therefore a fine based on loss, offense level, or a special Chapter Two instruction results in a guideline fine range higher than necessary to achieve the purposes of sentencing. Nevertheless, such fine should not be lower than if determined under §8C2.4(a)(2).".

REASON FOR AMENDMENT: This amendment is a result of the Commission's exploration of ways to simplify the guidelines and to reduce tension between 18 U.S.C. § 3553(a) and the *Guidelines Manual*. Specifically, the amendment removes one of the steps in the current three-step sentencing process, which requires courts to consider departures provided for within the *Guidelines Manual*. As amended, the *Guidelines Manual* now provides a two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the "starting point and initial benchmark" and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–51 (2007).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the portion of 18 U.S.C. § 3553 making the guidelines mandatory was unconstitutional. The Court has further explained that the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark" in sentencing proceedings. *See Gall*, 552 U.S. at 49; *see also Peugh v. United States*, 569 U.S. 530 (2013) (noting that "the post-*Booker* federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing"). After determining the kinds of sentence and guideline range provided for by the *Guidelines*, however, the court must also fully consider the factors in 18 U.S.C. § 3553(a), including, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," to determine a sentence that is sufficient but not greater than necessary. *See Rita v. United States*, 551 U.S. 338, 347–48 (2007).

In the wake of *Booker* and subsequent cases, the *Guidelines Manual* provided a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of §1B1.1 (Application Instructions) (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range and determines the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; (2) the court considers policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and (3) the court considers the applicable factors in 18 U.S.C. § 3553(a) in deciding what sentence to impose (whether within the applicable guideline range, or whether as a departure or as a variance (or as both)).

In the years since *Booker*, the frequency of departures has steadily declined with courts relying to a greater extent on variances in a manner consistent with the statutory requirements in section 3553(a). The shift away from departures deepened as a direct result of the holding in *Irizarry v. United States*, 553 U.S. 708 (2008), in which the Court held that the "reasonable notice" requirement in Rule 32(h) of the Federal Rules of Criminal Procedure does not apply to variances.

To better align the guidelines to practices under current sentencing law and to acknowledge the growing shift away from the use of departures, the amendment revises the guidelines in multiple ways. First, the amendment moves the "Original Introduction to the Guidelines Manual" from Chapter One, Part A to an Appendix of the *Guidelines Manual* as historical background. Second, the amendment revises the application instructions provided in §1B1.1 to reflect the simplification of the three-step process into two steps. At Step One, courts are to calculate the guideline range and determine the sentencing requirements and options under the *Guidelines Manual*. *See* §1B1.1(a). At Step Two, courts are to consider the section 3553(a) factors. *See* §1B1.1(b). Section 1B1.1(b) expressly lists the section 3553(a) factors the court must consider. Other conforming changes are made throughout Chapter One. For example, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) is amended to reflect the removal of departures. The Commission does not intend this

conforming amendment to substantively change the operation of the calculation of the amended guideline range in §1B1.10.

In addition, the amendment seeks to better address the distinction between the statutory limitations on the Commission's ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. § 3553(a). More specifically, the amendment revises §1A3.1 (Authority), which sets forth the Commission's authority in developing the guidelines. First, the provision is redesignated as §1A1.1 and, for clarity, is retitled as "Commission's Authority." Second, in addition to referring to 28 U.S.C. § 994(a) as the basis of the Commission's authority to promulgate guidelines, policy statements, and commentary, the provision explains how the Commission has complied with the requirements placed on it by Congress, noting what is not considered by the Commission in formulating the guidelines. This ensures that the Commission has addressed the provisions of sections 994(c), (d), and (e).

A new background commentary to this section explains that the requirements and limitations imposed upon the Commission by 28 U.S.C. § 994 do not apply to sentencing courts. Instead, the factors set forth by Congress in 18 U.S.C. § 3553(a) "permit a sentencing court to consider the 'widest possible breadth of information' about a defendant ensuring the court is in 'possession of the fullest information possible concerning the defendant's life and characteristics.'" *See Pepper v. United States*, 562 U.S. 476, 488 (2011); *see also Concepcion v. United States*, 597 U.S. 481, 493 (2022). The new background commentary concludes by noting that the application instructions set forth in §1B1.1 are structured to reflect a two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the "starting point and initial benchmark" and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).

Consistent with the revised approach, the amendment deletes most departures previously provided throughout the *Guidelines Manual*. Changes are made throughout the *Guidelines Manual* by deleting the departure provisions contained in commentary to various guidelines. However, some provisions, originally promulgated in response to congressional directives, are retained in another form. First, Application Note 1 of §2X7.2 (Submersible and Semi-Submersible Vessels) is revised to remove the language pertaining to a departure and instead indicates that the listed factors, which were identified by Congress in section 103 of Public Law 110–407, may warrant consideration in imposing a sentence. Similarly, Application Note 2 of §1B1.9 (Class B or C Misdemeanors and Infractions), which addresses Class B and C misdemeanors and infractions, is revised to add a reference to the aggravating nature of committing an offense while wearing or displaying insignia and uniform in violation of 18 U.S.C. § 716 (a class B misdemeanor). This guidance was previously set forth in a departure provision at §5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform).

The amendment also makes several changes to Chapter Five. The chapter is retitled "Determining the Sentencing Range and Options Under the Guidelines" to focus on the rules pertaining to the calculation of the guideline range, and the introductory commentary is revised to better reflect the chapter's purpose by noting that "a sentence is within the guidelines if it complies with each applicable section of this chapter." All provisions previously contained in Chapter Five, Part H (Specific Offender Characteristics), and most of the provisions in Chapter Five, Part K (Departures), are deleted. Only the provisions pertaining to substantial assistance are retained under §5K1.1, and the provision pertaining to early disposition programs is moved from §5K3.1 to Chapter Three, Part F.

Chapter Five is also amended at §5B1.1 (Imposition of a Term of Probation), §5D1.1 (Imposition of a Term of Supervised Release), and §5D1.3 (Conditions of Supervised Release) to emphasize the factors courts are statutorily required to consider in determining the conditions of probation and supervised release. The commentary is further revised to retain factors that the Commission had previously identified as relevant in Chapter Five, Part H pursuant to the congressional guidance provided to the Commission in 28 U.S.C. § 994(d) and (e).

Changes are also made to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment) in response to comment urging the Commission to retain the guidance regarding certain undischarged or discharged terms of imprisonment currently contained in §5G1.3, Application Note 4(E), and §5K2.23 (Discharged Terms of Imprisonment (Policy Statement)). These procedural aspects of imposing a sentence are particularly complex and at times confusing for courts given the intersection of a court's authority to sentence and the Bureau of Prisons' authority to execute that sentence. The amendment thus makes several changes to the commentary in §5G1.3 to ensure courts continue to receive guidance on the treatment of undischarged and discharged sentences not otherwise addressed in the guideline. First, a new application note is added at Application Note 4(E), which would provide that where the court accounts for an undischarged term of imprisonment covered by subsection (d), the court should clearly state that the sentence was imposed pursuant to 18 U.S.C. § 3553(a), rather than as a credit for time served, to avoid confusion with the Federal Bureau of Prisons' exclusive authority under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances. Similarly, a new Application Note 5 would provide similar guidance on the court's authority to consider an already discharged term of imprisonment that would, if undischarged, qualify for consideration under §5G1.3(b). This new Application Note would preserve the concept previously addressed in §5K2.23.

Finally, in conjunction with the amendment, the Commission plans to compile the deleted departure provisions, as they were last provided in the 2024 edition of the *Guidelines Manual*, in a new Part III of Appendix B. At the time these departure provisions were promulgated, they represented grounds that the Commission expressly authorized in the *Guidelines Manual* as a basis for a sentence outside of the otherwise applicable guideline range. These provisions, which were based on various circumstances of the offense, specific personal characteristics, and certain procedural history of the case, reflected the Commission's determination that such circumstances were outside of the heartland of offenses addressed by the guidelines and warranted the court's consideration in imposing sentence. Because the Commission envisions this amendment to be outcome neutral, the introduction to the compilation of deleted departure provisions explains that the removal of departures from the *Guidelines Manual* does not reflect a determination by the Commission that the rationale underlying the deleted departure provisions is no longer informative and does not serve as a limit to the information courts may consider in imposing a sentence. It is the Commission's intent that judges who would have relied upon facts previously identified as a basis for a departure will continue to have the authority to rely upon such facts, or any other relevant factors, to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a).

Effective Date: The effective date of this amendment is November 1, 2025.